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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

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MASSACHUSETTS.

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 SETH AMES,‡
 MARCUS MORTON,

* Appointed March 16, 1881, in place of Richard Johns Bowie, deceased.
 † Appointed February 10, 1881, in place of George Brent, deceased.
 ‡ Resigned January 15, 1881.

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OTIS P. LORD,
AUGUSTUS L. SOULE,
WALBRIDGE A. FIELD. *

MISSOURI.

THOMAS A. SHERWOOD, CHIEF JUSTICE.
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CALEB S. GREEN,
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CHARLES ANDREWS, CHIEF JUDGE. ‡
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THEODORE MILLER,
ROBERT EARL,
GEORGE F. DANFORTH,
FRANCIS M. FINCH,
BENJAMIN F. TRACEY. §

* Appointed February 21, 1881, in place of Seth Ames, resigned.

† Resigned November 14, 1881.

‡ Appointed November 19, 1881, vice Charles J. Folger, resigned.

§ Appointed December 8, 1882, vice Charles Andrews, appointed Chief Judge.

LIST OF JUDGES.

NORTH CAROLINA.

WILLIAM N. H. SMITH, CHIEF JUSTICE.

THOMAS S. ASHE,

THOMAS RUFFIN.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

FELLOWS v. LEWIS.

(65 Ala. 343.)

Homestead — voluntary conveyance of as against creditors.

A voluntary conveyance by a debtor of land in which he has a right of homestead is not constructively fraudulent as to his creditors,* but on his death, leaving neither wife nor child, they may subject it to their claims.

BILL to set aside fraudulent conveyance by deceased debtor.
The opinion states the case.

Pettus & Dawson, Brooks & Roy, and Fellows & John, for complainant.

Sutterfield & Young and Lapsley & Nelson, for Mrs. Lewis.

STONE, J. [Omitting other considerations.] One purpose of the cross-bill is to assert in Mrs. Lewis, the grantee, a right to Grey's homestead exemption in the lands conveyed. * * *
The grounds on which this claim of exemption is based are that at the time of the conveyance Mr. Grey had his homestead and resi-

*To same effect, *Ruohs v. Hooke* (3 Lea, 302), 81 Am. Rep. 642; *Derby v. Weyrich* (8 Neb. 174) 80 Am. Rep. 827.

dence on these lands; that the homestead was in his favor exempt from levy and sale for the payment of his debts; that not being liable to his debts, his conveyance, even without consideration, could not delay, hinder, or defraud his creditors, for they had no rights in the premises of which such conveyance could deprive them. If this position be sound then Mrs. Lewis' claim and title are good; for Grey's deed to her is valid and binding between them, even though tainted with a fraudulent intent.

This question has been a great many times before the courts of the country and in a large majority of cases the ruling was against the right of the creditor to subject the homestead, merely because its owner and occupant had conveyed his right to another, even though the conveyance was voluntary, or made under circumstances which would ordinarily stamp it as fraudulent. There can be no fraud unless there are claims and rights which can be delayed and hindered and which, but for the conveyance, could be asserted. The law takes no cognizance of fraudulent practices that injure no one. Fraud without injury, or injury without fraud, will not support an action. Unless they co-exist the courts are powerless to render any relief. *Castle v. Palmer*, 6 Allen, 401; *Legro v. Lord*, 10 Me. 161; *Foster v. McGregor*, 11 Vt. 595; *Danforth v. Beattie*, 43 id. 138; *Crummen v. Bennett*, 68 N. C. 494; *Sears v. Hanks*, 14 Ohio St. 298; *Vaughan v. Thompson*, 17 Ill. 78; *Muller v. Inderreiden*, 79 id. 382; *Anthony A. C. Co. v. Wade*, 1 Bush, 110; *Morton v. Rayan*, 5 id. 334; *Lishy v. Perry*, 6 id. 515; *Knevan v. Specker*, 11 id. 1; *Vogler v. Montgomery*, 54 Mo. 577; *Smith v. Rumsey*, 33 Mich. 183; *Huginin v. Dewey*, 20 Iowa, 368; *Dreutzer v. Bell*, 11 Wis. 114; *Pike v. Miles*, 23 id. 164; *Murphy v. Crouch*, 24 id. 365; *Succession of Cottingham*, 29 La. Ann. 669; *Edmonson v. Meacham*, 50 Miss. 34; *Wood v. Chambers*, 20 Tex. 247; *McFarland v. Goodman*, 6 Biss. 111; *Cox v. Wilder*, 2 Dill. 45; *Smith v. Kerr*, id. 50. The following cases hold the contrary doctrine; but in some of them it will be seen the facts were different. *Gotzler v. Saroni*, 18 Ill. 511; *Currier v. Sutherland*, 54 N. H. 475; s. c., 20 Am. Rep. 143; *Henry's Appeal*, 29 Penn. St. 219.

In the cases cited above, negating the liability of the homestead which has been fraudulently conveyed, the reasons given are substantially as follows: The property, homestead, is not liable to seizure under execution, and therefore a conveyance of it is a ques-

Fellows v. Lewis.

tion in which the creditor has no interest. It was not liable before conveyance to the claim he asserts; and the conveyance, though fraudulent, puts the creditor in no better condition than he was in before. If the conveyance is set aside as fraudulent this leaves the homestead as if no attempt had been made to convey it, so far as any claim can be asserted by the creditor. It is void as to him to all intents and purposes. He cannot be heard to say in one and the same breath that the conveyance is void in its attempt to divest title out of the debtor, but is valid in destroying the homestead right. He can not claim both under and against the conveyance; under it as a valid parting with the homestead right; against it as an abortive effort to pass title out of the debtor. It must stand, as to him, as if no conveyance had been attempted.

The case of *Cox v. Wilder*, 2 Dill. 45, was a suit by an assignee in bankruptcy to set aside as fraudulent a deed by the bankrupt and his wife, conveying a body of lands. The deed was pronounced fraudulent and was set aside. The question was, did these proceedings bar the dower-right of the wife? The rule as to dower is said to be the rule as to homestead. Thompson on Homestead, § 405 to 409. DILLON, J., with his accustomed force, said: "We solve the question here presented as to dower, when we determine under whom the assignee claims, and to whose rights he succeeds. * * * He claims not under but adversely to the deed of Wilder. He succeeds to all the interests of the bankrupt, and represents his creditors so far as to enable him to attack conveyances made by the bankrupt in fraud of their rights. He claims that the deed is void as to creditors, and on this ground alone he attacks it; and upon this ground alone has he any right to the property. He says it is void as to creditors because fraudulent, and for this reason asks to be invested with the title which it fraudulently conveyed. He cannot claim under it, and must claim against it. When it is decreed to be fraudulent and void at his instance how can he set it up to defeat the right of the wife to dower? Such a position involves this inconsistency, viz., that it asks that the same instrument be held void as to creditors, and then in their favor held valid as to the wife." In another place he says: "Similar considerations in my judgment apply to the homestead right."

Lishy v. Perry, 6 Bush, 515, was a case of homestead conveyed, which creditors sought to subject to their demands, for alleged fraud in the conveyance. The court said: "Whatever may have

been his intention in making the conveyance to Clayton, it cannot be said that any legal right of the appellants was violated by the conveyance of property which was exempt from liability to sale for their debt."

The deed under which Mrs. Lewis claims was, as we have said, executed on the fifth day of December, 1874. Mr. Grey, the grantor, died three months afterward and long before the bill in this case was filed. Neither at the making of the deed, nor at the time of his death, had he wife or child. He had his domicile on the lands in controversy when he made the conveyance; and was entitled to a homestead exemption therein, under the Constitution of 1868. What was the duration of his homestead claim? Did he hold the homestead by a tenure different from that by which he held his other lands? and if so, in what respect different? His title to the entire tract was a fee. The Constitution and Statute declare that the homestead "shall be exempted from sale on execution, or any other process from a court, for any debt contracted since the thirteenth day of July, 1868, or after the ratification of this Constitution." Mr. Grey, as we have seen, left neither wife nor child surviving him. Supposing he had died the owner of the homestead without conveying it, what would have been its status? how held, and by whom held, after his death? Would its exemption from sale on execution, or other process of a court for debt, have adhered to it in the hands of his next of kin as heirs at law? If so, then the homestead would have passed by descent to his heirs at law, and could not have been taken possession of or utilized by his personal representative in the payment of his debts, although his estate otherwise might be insolvent. No one ever supposed, that on the death of a landholder, having a homestead, leaving neither minor child nor widow, the descent of the homestead is governed by rules different from those which govern in the descent of his other landed estate. All go alike to the devisee or heir, subject to a prime and paramount liability for the debts of the ancestor. If decedent leave minor child or widow him surviving, then the exemption is prolonged; not otherwise. Const. of 1875, art. 10, §§ 2, 3, 5; Code of 1876, §§ 2820, 2821, 2840. The exemption of Mr. Grey's homestead from his debts was only during his life.

In the case of *Chambers v. Sallis*, 29 Ark. 407, the court said: "The legal effect of this act is to create no new estate, but to protect the occupant of the land in the use and occupancy of the land

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so set apart as a homestead, during the time of such occupancy; but if abandoned by removal or death, leaving neither wife nor children to succeed to his rights, the rights of the judgment creditor would be fully restored." See, also, *Norris v. Kidd*, 28 Ark. 485. If we were to hold that by Mr. Grey's conveyance of the homestead, while he occupied it as such, he invested Mrs. Lewis with a fee exempted from his debts, notwithstanding the deed was voluntary or fraudulent, the result would be to accord to a conveyance, which all the authorities say is inoperative against creditors, the wonderful power of converting a temporary exemption from debt into a fee simple absolute. Upon a consideration merely good, he could not convey to her greater rights, and greater exemptions than he had himself. Although Mrs. Lewis could hold the homestead during the life of Mr. Grey, her authority and right ceased at his death, and the property then became liable to his debts. In other words, the conveyance vested in her all the rights in the homestead which he could assert against his creditors; nothing more.

With the single exception of the error announced above, we concur in all the conclusions reached by the chancellor, in his very able and carefully prepared opinion. The conveyances must be pronounced voluntary, and constructively fraudulent, as against existing creditors. *Bibb v. Freeman*, 59 Ala. 612; *Sandlin v. Robbins*, 62 id. 477. We hold also there is no ground on which to claim homestead. * * * * *

The decree must be reversed on the errors assigned for the complainants in the court below, and the cause remanded, to be proceeded in according to the principles of this opinion. There is nothing in the cross assignments by Mrs. Lewis and she can take nothing thereby.

Decree reversed and cause remanded.

BOLLING V. TATE.

(65 Ala. 417.)

Damages — injunction bond — counsel fees.

In an action on an injunction bond, counsel fees are recoverable, as part of the damages, for services in all the courts, but only for services in procuring the dissolution of the injunction. (See note, p. 18.)

of prosecuting the writ of error or appeal have been damages, caused by the wrongful suing out of the writ? Suppose again, the defendant had erroneously succeeded in the court below, and thus acquired a right to sue on the bond; and the plaintiff had brought the case to this court, obtained a reversal, and established the right he had asserted by his suit, could the defendant maintain a suit on the bond, and recover for the breach the judgment of the court below had established? Or would not the judgment of this court be a full answer to his action? We think our predecessors erred in confining the liability of the bondsmen to the damage suffered in the court below.

The peculiar features of this case have caused us to extend these remarks further than we otherwise would have done. By the letter of the bond given, the bondsmen bound themselves to pay damages, if the injunction was dissolved by the Chancery Court; and the argument is, that the bond is not broken, because the Chancery Court of Butler did not dissolve the injunction. If we were to follow the seeming lead of the cases of *Ferguson v. Baber*, and *Bullock v. Ferguson*, we should be driven to the following strange, if not anomalous, results: *First*, that for obtaining the dissolution of an injunction wrongfully sued out, full compensation for attorney's fees cannot be recovered, unless the dissolution is obtained in the court below, without appeal to this court; *second*, that when the Chancery Court refuses to dissolve, and this court, on appeal, reverses its decree, and dissolves the injunction, damages can be recovered for services of counsel in the unsuccessful attempt to obtain dissolution in the court below, but cannot be recovered for such services, though successful, rendered in this court, without which the injunction would not have been dissolved. With all proper respect for our predecessors, it would seem that all necessary and proper expenses incurred to procure the dissolution, or to prevent its re-instatement, in the court below, or in this court, are the natural and proximate result of the wrongful suing out of the injunction, and are recoverable as damages. The error, if not absurdity of the opposite ruling, is shown, we think, by the rulings which the special judge felt himself bound by precedent to make in this case. He allowed a recovery for attorney's services rendered in the Chancery Court, where the injunction was not dissolved, and disallowed the claim for similar services rendered in this court, where the injunction was dissolved. If we were to affirm his rul-

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ing in this regard, we should place ourselves in this further anomalous position: The obligation of the bond, as we have seen, is to pay damages, in the event the injunction is dissolved by the Chancery Court. We should be holding, that this language is broad enough to embrace a dissolution by this, the Supreme Court, and yet not broad enough to provide for the professional services necessary to procure that dissolution.

In *Edwards v. Bodine*, 11 Pai. 223, Chancellor WALWORTH, speaking on this subject, said: "The necessity of paying such counsel fees is an actual damage, which the defendants have sustained by reason of the injunction. * * * It is not a mere matter of discretion, as the condition of the bond is imperative, that the obligors in the bonds shall pay, to the parties enjoined, such damages as they may sustain by reason of the injunction. Under a covenant of warranty in a conveyance, also, the grantee, who has been evicted, is allowed to recover against his grantor the necessary counsel fees which he has been compelled to pay in defending his title, as a part of the damages which the grantee has sustained by the breach of the covenant of warranty. And I can not discover any distinction, in principle, between that case and the one now under consideration. For if the extra counsel fees, which the grantee had necessarily been compelled to pay in that case, in an unavailing attempt to defend his title, were a part of the damages occasioned by the breach of warranty, similar counsel fees, which these appellants were obliged to pay, in this case, to obtain a dissolution of the injunction, were a part of the damages which they sustained by reason of that injunction."

In *Hayden v. Sample*, 10 Mo. 215, suit was brought on an attachment bond, conditioned to pay all damages that should accrue to the defendant, or any garnishee, in consequence of the attachment. Attorney's fees in defending and defeating the attachment suit were claimed as damages. The attachment suit had gone off, on a plea in abatement. Plaintiff recovered in the court below, on his claim for counsel fees; and it was contended in the Supreme Court, that the condition of the bond did not extend to or embrace, the costs which accrued on the trial of the issue formed on the plea in abatement. The court said: "We are of opinion that these costs may very properly be considered as costs accruing to the defendant, 'in consequence of the attachment.' All the costs of the subsequent proceedings, authorized by the act, may be re-

garded as a consequence of the attachment." The judgment of the court below was affirmed. An examination of the report of that case will show, that the court included under the General Term costs the fees paid to counsel in maintaining the plea in abatement.

In the case of *Andrews v. Glenville Woollen Co.*, 50 N. Y. 282, motion to dissolve an injunction was made, and the motion refused, the court deeming it more advisable to defer the inquiry into the merits until the final hearing. On final hearing, the motion was granted, and the injunction dissolved. The question was, whether the services of counsel in making the motion to dissolve could be recovered as damages in a suit on the bond. The court said: "It was proper that the defendant should move at the earliest opportunity, to dissolve the injunction. His motion did not fail through any fault on his part, or any defects in the merits of his case. The court simply deferred its decision upon the merits, until the trial. The result which must, for the purposes of this application, be assumed to be correct, shows that if the decision had not thus been deferred the motion should have been granted when made. Under these circumstances I think the expenses of the motion were reasonably and properly incurred, as a direct consequence of the injunction, and were properly allowed by the referee." See, also, *Corcoran v. Judson*, 24 N. Y. 106; *Brown v. Jones*, 5 Nev. 374; *Trapnall v. McAfee*, 3 Metc. (Ky.) 34; *Bank v. Heath*, 45 N. H. 524; *Fitzpatrick v. Flagg*, 12 Abb. Pr. 189; *Littlejohn v. Wilcox*, 11 La. Ann. 620; *McRae v. Brown*, 12 id. 181; *Transit Co. v. McRae*, 13 id. 214; *Phelps v. Coggeshall*, id. 440; *Murray v. Munford*, 2 Cow. 400; *Boyd v. Brisban*, 11 Wend. 229.

The fees recoverable however are not necessarily for the defense of the whole action. They are limited to that part of the defense, or the whole, as the case may be, that may be rendered necessary by the writ of seizure, or injunction complained of.—*Andrews v. Glenville Woollen Co.*, 50 N. Y. 282; *Derry Bank v. Heath*, 45 N. H. 524; *Trapnall v. McAfee*, 3 Metc. Ky. 34; *Pettit v. Owen*, 8 B. Mon. 51; *Burgen v. Shaver*, 14 id. 500; *Transit Co. v. McRae*, 13 La. Ann. 214; *Phelps v. Coggeshall*, id. 440; *Brown v. Jones*, 5 Nev. 374; Sedg. Dam. 397, marg., and note.

[Omitting minor questions.]

On the assignments by Bolling and Caldwell, we find no error in the record. On the assignments by Tate, the judgment is reversed, and the cause remanded.

Reversed and remanded.

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NOTE BY THE REPORTER.—In *Oliphint v. Mansfield*, 36 Ark. 191, it was held that counsel fees are not allowable as damages on dissolution of an injunction. The court said: "In some States such fees are allowed upon the dissolution of an injunction, but we are unable to see any satisfactory reason why they should be. In the Federal courts they are not allowed. In the case of *Oelrichs v. Spain*, 15 Wall. 211, Mr. Justice SWAYNE said: 'In debt, covenant and assumpsit damages are recovered, but the counsel fees are never included. So in equity cases when there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master or an issue to a jury might be necessary to ascertain the proper amount; and this granted, litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.' We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

In *Putton v. Garrett*, 37 Ark. 605, the same rule was held in a case of attachment, the court observing: "In England attorneys' fees are taxed as costs in the suit and allowable in other actions as damages, wherever full costs of a suit may be. In America generally the compensation of attorneys is matter of contract between attorney and client, and in no sense costs of the suit. They are proper expenses and of course are allowable in all cases where punitive or exemplary damages may come in. But as to whether they are necessary and direct damages in ordinary cases the American authorities are in conflict. The difference of opinion has arisen principally in suits by vendees, under covenants of warranty, seeking to recover damages for eviction by suit, claiming attorneys' fees as part of the expenses incurred from breach of warranty. Some of the courts have held them to be recoverable and some not. See the matter discussed and the cases cited in *Turner v. Miller*, 42 Tex. 418; s. c., 19 Am. Rep. 47. We acknowledge the difficulty of seizing upon any clear principle upon which the mind can unhesitatingly rest to determine the question either way. We think, however, that the weight of authority and the better reason is in favor of discarding such claims, as the proper, natural and direct consequences of a suit improperly prosecuted, but without malice, or on improper motive. Laws which give remedial rights should not too greatly imperil those who honestly seek them. The occasional necessity for the payment of attorneys' fees may be a misfortune, but it is one of the risks which citizens assume as the price of a government by law instead of one by violence and caprice, or none at all; and as in case of other burdens it is better that each should assume the risk for himself than to cast it upon those who honestly, though mistakenly, appeal to the courts for a vindication of their supposed rights. There is also an inconvenience with danger of injustice in applying a different rule to the case of a false attachment. The same attorney usually defends the suit upon its merits and the suit may be properly brought. How much of the attorney's compensation results from opposing the attachment, as distinct from the suit, is not easily apportionable, and that portion is the utmost to which the defendant can be entitled. He certainly cannot throw upon the plaintiff the whole cost of defending a meritorious suit because the plaintiff had made a mistake in seeking an ancillary remedy. In harmony with these views the court has heretofore held in the case of *Oliphint v. Mansfield*, 36 Ark. 191, that counsel fees are not allowable on the dissolution of an injunction."

KINGSBURY V. FLOWERS.

(65 Ala. 479.)

Nuisance — private burial ground.

A private burial ground near dwellings is not necessarily a nuisance, and its use can only be enjoined on clear proof of probable injury. (*See note, p. 16.*)

BILL to enjoin use of a private burial ground. The opinion states the case. The complainants had judgment below.

J. C. Richardson, for appellants.

D. Buell, contra.

BRICKELL, C. J. [Omitting minor considerations.] The jurisdiction of a court of equity to restrain the commission or continuance of a private nuisance is not doubted. It is not of the ordinary jurisdiction of the court; the court interferes because of the inadequacy of legal remedies. There are no more frequent instances of the interference of the court, than for the prevention of the commission or continuance of the injuries apprehended by the complainant — the material diminution of the comfortable enjoyment of the dwelling-house, and the diminution or destruction of health, by the pollution of water or of the atmosphere. When the matter complained of is not, in itself, a nuisance; when it is not, in its very nature, hurtful to others; when it does not, of necessity, threaten to impair materially the health and comfort of those who may live near it, and the fact that it is a nuisance has not been established at law, the court abstains from interference, unless a case of pressing necessity is shown by the bill and by the proofs. *Rosser v. Randolph*, 7 Port. 238. Nor will the court interfere, when the thing complained of is not in existence, but may be called into existence by threatened acts of the defendant, in the exercise of his lawful dominion over his property, and it is uncertain, dependent upon circumstances in the future, whether it will or not operate injuriously. *St. James Church v. Arrington*, 36 Ala. 546.

The allegations of the present bill are, that the graves now on the grounds are west of south of complainant's dwelling; the one

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nearest is one hundred and eighty-two feet from the well on his lot; the whole burial ground is on more elevated ground than his lot, and there is a fall of from four to five feet from the surface of the graves to the surface of the well. The natural course of the surface-water from the burial ground is through the lot of the complainant and near to the well. He has been compelled to cut a ditch to turn the surface-water and surface-drainage from his yard and well. There is the further general allegation, that any further interments on these grounds will endanger the health of complainant and his family, by corrupting the water of the well and polluting the atmosphere. The first burial on the grounds was in 1863, and the last in 1874; and it is not averred that there was, from either, any pernicious consequence to the complainant or to his family; nor that any harm thus far has been suffered from use of the grounds as a burial-place. These averments are too general and indefinite to authorize the interference of a court of equity. Facts and circumstances should have been stated distinctly, from which the court could see plainly, that if future interments on these grounds are not prevented, there would be a diminution of the complainant's enjoyment of his dwelling, and at least probable injury to the health of his family. It is not enough to allege simply that such consequences will result. There must be such a clear, precise statement of facts, that there can be no reasonable doubt, if the acts threatened are completed, grievous injury will result. *Adams v. Michael*, 38 Md. 128; s. c., 17 Am. Rep. 516; *Begein v. City of Anderson*, 28 Ind. 79.

Burial places for the dead are indispensable. They may be the property of the public, devoted to the uses of the public, or the owner of a freehold may devote a part of his premises to the burial of his family or friends. It is but a just exercise of his dominion over his own property. Neither adjoining proprietors nor the public can complain, unless it is shown, that from the manner of burial, or some other cause, irreparable injury will result to them. It is quite an error to suppose that of itself a burying ground is a nuisance to those living in its immediate vicinity. Much depends upon the mode of interment, whether it can be justly asserted that in any event injury will result from it. The particular locality and its surroundings must also be considered. Low, damp grounds, percolated by water, will hasten decomposition, and the soil will be saturated with its products. Dry, high, well venti-

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lated localities retard rather than hasten decomposition; and if in a brief space of time there were numerous burials, there might be great peril of the products of decomposition escaping into and polluting the atmosphere.

There is not a fact stated in the bill from which it can be justly inferred, that if the burials on these grounds should be made in the usual mode, or in the mode in which the former burials were made, any injury could result to the complainant. The surface-water flowing through his lot is but taking its natural course; and by cutting a ditch he has diverted it from his well, avoiding all injury from it, if any could reasonably be apprehended. The apprehension of injury from this source, it is evident, could be quieted by but slight labor expended in drainage — a labor, it may be, if requested, the defendants would have performed rather than to have been forced into this litigation. *Rosser v. Randolph, supra*. It is not such an injury, capable of being remedied so easily, that a court of equity will interfere to restrain; nor will it interfere to prevent the thing from which it is apprehended. Without the averment of special circumstances, from which the court can be satisfied that future burials on these grounds will most probably result in a nuisance, from which the complainant will suffer special injury, irreparable by the ordinary remedies at law, there should not be interference to restrain them. *Musgrove v. St. Louis Church*, 10 La. Ann. 431; *New Orleans v. Wardens*, 11 id. 244; *Ellison v. Commissioners*, 5 Jones Eq. 57; *Lake View v. Letz*, 44 Ill. 81; *Lake View v. Rose Hill*, 70 id. 191; s. c., 22 Am. Rep. 71; *Begein v. City of Anderson*, 28 Ind. 79.

The bill is obnoxious to several of the causes of demurrer assigned, and the result is the decree of the chancellor must be reversed, and the demurrer sustained upon all the grounds taken, except so far as we have indicated otherwise; and the cause is remanded, that the complainant may, if he desires, have the opportunity of amendment.

Reversed and remanded.

NOTE BY THE REPORTER.—See *Monk v. Packard*, 71 Me. 309; s. c., 36 Am. Rep. 815. In *Upjohn v. Board of Health*, Michigan Supreme Court, Oct. 1881, complainant sought to enjoin the location of a burying ground near his residence, for the reason, among others, that it would destroy his well. *Held*, to be a strong circumstance against his application that he had voluntarily bought and located his residence in the immediate vicinity of a burying ground which defendants were merely proposing to enlarge without bringing it nearer. And it appearing further that complainant's barnyard was nearer the well and more likely

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than the burying ground to injure it, *held*, that an injunction should be denied. It is a query whether there can be any legal ground for complaint for the pollution of subterranean waters when it is caused by a proper use, without negligence, of adjacent premises. If there can be any such ground of complaint it can only be when the injury is of a very positive and substantial character. It has been decided in several cases that the percolation of filthy matter from the premises of the party who suffers it, through the soil upon the premises of an adjacent owner, to the injury of the latter, is an actionable nuisance. *Tenant v. Goldwin*, 1 Salk. 380; *Tate v. Parrish*, 7 T. D. Monr. 323; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 382; *Marshall v. Cohen*, 44 Ga. 489; s. c., 9 Am. Rep. 170; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Green v. Nunnemacher*, 36 Wis. 50. And it has been said that the liability does not depend upon negligence, but that the reasonable precaution which the law requires is effectually to exclude the filth from the neighbor's land. *Ball v. Nye*, 99 Mass. 582; *Hodgkinson v. Ennor*, 4 Best & S. 229. But all the cases in which this doctrine has been applied were cases in which, consistent with the proper use of the premises, the exclusion was practicable; and none of them goes to the extent contended for here. All of them agree that the injury must be positive and substantial, and such as fairly imposes upon the party causing it the duty of restraint. *Columbus Gas Co. v. Freeland*, 12 Ohio (N. S.), 392, 400. The movements of sub-surface waters are commonly so obscure that rights in or respecting them cannot well be preserved. They do not often have a well-defined channel and it is not easy in many cases to determine in what direction their movements tend. If corrupted at one point the effect may be confined within very narrow limits, while at another, though no surface indications would lead one to expect it, the taint might follow the water for miles. In some cases a new well at a considerable distance from an old one may withdraw the water from the other and destroy it, while in other cases, in which the same result would seem more likely, there is no perceptible influence. It is in view of these difficulties that the rule of law has become established that owners of the soil have no rights in sub-surface waters not running in well-defined channels, as against their neighbors who may withdraw them by wells or other excavations. *Acton v. Blundell*, 12 M. & W. 824; *Greenleaf v. Francis*, 13 Pick. 117; *Roath v. Driecoll*, 20 Conn. 538; *Chatfield v. Wilson*, 28 Vt. 49; *Wheatly v. Baugh*, 25 Penn. St. 528; *Bliss v. Greely*, 45 N. Y. 671; s. c., 6 Am. Rep. 157; *Chase v. Silverstone*, 63 Me. 175; s. c., 16 Am. Rep. 419; *Frazier v. Brown*, 12 Ohio St. 294; *Albany, etc., R. Co. v. Peterson*, 14 Ind. 112. But if withdrawing the water from one's well by an excavation on adjoining lands will give no right of action it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure and no negligence. The one act destroys the well and the other does no more; the injury is the same in kind and degree in the two cases.

ROBERTSON V. ROBINSON

(65 Ala. 610.)

Contract — public policy — public office.

The plaintiff and a candidate for the office of tax assessor agreed that if the latter was elected he would appoint the former his chief deputy, at a salary of \$2,500, to be paid from the fees and perquisites of the office, and the latter should become his official bondsman, and perform all the duties of the office except those relating to the poll-tax. *Held* void, as against public policy.

ACTION on contract. The opinion states the case. The defendant had judgment below.

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Watts & Son, for appellant.

R. M. Williamson, contra.

BRICKELL, C. J. When the primary court has jurisdiction, it is not the practice of an Appellate Court to consider any other matter than such as may have been acted on in the court below, and the action assigned as error. Other matters which may be suggested, or which are apparent on the face of the record, and which, if attention had been directed to them in the primary court, would or could be presented in a different aspect, it would be injustice to make the basis of decision. In the present case, the contention in the City Court was limited to the validity of the agreement between the appellant and George W. Sewell. No other question was considered or passed upon; and it is that question only we propose now to decide.

All agreements or contracts, having for their object that which is repugnant to public justice, or violative of public policy, or offensive to good morals, or contrary to statutory provisions, or in derogation of the principles of the common law relating to the public peace or security, and injurious to the community, are void; "and the reason why the common law says such contracts are void, is for the public good." The agreement between Sewell and appellant, it is insisted, falls within this general principle, because in fact, it was the sale of the office or employment of deputy tax-assessor of the county of Montgomery. Whether this is the real character of the agreement, and if it be, whether it is offensive to law, and violative of public policy, requires that the whole transaction should be inquired into and considered. The form of the agreement, and the expressions embodied in the writing to which it was reduced, are only matters of evidence, not operating an estoppel upon the parties, and not embarrassing or hindering the court. If it were otherwise—if the manner of the transaction could gild over and conceal the truth, this great conservative principle of the law, essential to the purity of the administration of justice, of public morals, and general welfare, would be evaded at the pleasure of the designing, the wicked, and the corrupt.

The county assessor of taxes is a public officer, elected by the qualified voters of the county, commissioned by the governor, required to take the oath of office prescribed by the Constitution to

be taken by all public officers, the highest or lowest, and charged with duties of great importance to the public and to the citizen — duties not only ministerial, but in their nature, in some respects, judicial. He has authority to appoint deputies, whose acts have the force and effect of his official acts, and for whose good conduct he is responsible. Code of 1876, § 397. The deputy appointed by him, not for a mere particular case, or for a mere casual, special service, is required to take the constitutional oath of office. The statute authorizing his appointment, requiring him to take the oath of office, distinguishing between him and one whom the assessor may appoint to a special service, places him, in many respects, as a public officer.

The transaction between Sewell and the appellant had its origin on the day of, and pending the election of a tax assessor for the county of Montgomery, in November, 1874. It commenced by a proposition made by Sewell to the appellant, in substance, that if Sewell, who was a candidate for tax assessor, was successful, he would appoint the appellant his chief deputy, and pay him from the fees and perquisites of the office twenty-five hundred dollars annually, if the appellant would make for him his official bond, and perform all the duties of the office, except such as related to the assessment of the poll-tax. The proposition was accepted, and it is this agreement the subsequent writing was intended to embody, and which the parties treated as embodying.

Of such an agreement, in the strong language of Chief-Justice WILMOT, in *Collins v. Blantern*, 2 Wils. 341 (1 Smith's L. C., Pt. 2, 673), it may be said, that it "is void *ab initio*, by the common law, by the civil law, moral law, and all laws whatever." It concerns a place of public trust, in which the public have high interests, involving the performance of public duties, and which cannot be made the subject of traffic, and cannot become the matter of trade and bargaining. It was corrupting the appellant as a voter, bound by his duty to cast his vote from public, not private considerations, on the eve of the election to make such a proposition; tempting him to merge his duty as a citizen in the promptings of mere selfishness, in the gratification of his avarice. It was bargaining away the discretion in the appointment of a deputy, which Sewell was bound to exercise for the public good, and not for the promotion of his private interests or convenience. It was an irrevocable appointment, continuing during the term of office,

which was contemplated, fettering the power of appointment with which Sewell was clothed by law. In fact it was a sale of the office of deputy, and the consideration was not only the services the appellant was expected to render, but the making of the official bond. The people of Montgomery county, trusting to the integrity and good judgment of Sewell, elected him to the office of assessor of taxes. Their confidence was repaid by his transfer to the appellant of every duty not merely ministerial, attaching to the office, in consideration really of ease and convenience in making the official bond. It would be far better that public trusts, public offices, or the deputations to them, should be exposed at public auction to the highest or to the lowest bidder, than that they should become the subject of such private bargaining and traffic. We cite numerous authorities which it is unnecessary to review specially, and in which the bargaining away of public offices, or of deputations to them, have been pronounced void. 2 Chit. Cont. 990; 1 Add. Cont. 262, 266; *Hanington v. Duchatell*, 1 Brown C. C. 124; *Morris v. McCulloch*, Amb. 455; *Lee v. Coleshill*, Cro. Eliz. 529; *Garforth v. Fearon*, 1 H. Bl. 328; *Godolpin v. Tudor*, 2 Salk. 468; *Greenville v. Atkins*, 9 B. & C. 462; *Tappan v. Brown*, 9 Wend. 175; *Gray v. Hook*, 4 Conn. 449; *Haralson v. Dickens*, N. C. L. R. 66; *Grant v. McLester*, 8 Ga. 553; *Lewis v. Knox*, 2 Bibb, 453; *Outon v. Rodes*, 3 A. K. Marsh. 453.

No judicial tribunal, so far as we can discover, has ever given countenance to any such agreement; and if popular elections are to be kept free from the taint of selfishness and corruption — if public offices are to be dignified as public trusts, and the performance of official duty preserved from the contamination of unlawful and improper influences, all such agreements will be condemned.

The validity of the agreement was the only question presented to, and decided by the City Court, and the manner of presenting it was matter of agreement between the parties. The court did not err in pronouncing the agreement void, and its judgment is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

STILLMAN V. STILLMAN.

(99 ILL. 193.)

Marriage — divorce — alimony — remarriage.

The remarriage of a divorced wife to whom alimony has been granted is a valid ground for revoking or reducing alimony, it not appearing that the new husband is not able to support her. (*See note, p. 27.*)

APPPLICATION to revoke alimony. The opinion states the facts. The trial court reduced the alimony to a nominal sum, but this was reversed by the Appellate Court.

A. T. Galt, for appellant.

Joseph Wright, for appellee.

SCOTT, J. On the 9th day of July, 1877, Fannie H. Stillman obtained a divorce from her husband, Charles P. Stillman, on bill filed in the Circuit Court of Cook county, where the parties resided. The decree rendered made it obligatory on defendant to pay complainant \$60 per month as alimony. That sum was regularly paid to complainant up to the 1st day of February, 1880. On the 14th day of January, 1880, complainant married Frank Eldridge, with

whom she has ever since lived as his wife. At the March term, 1880, of the Circuit Court in which the divorce proceedings were had, defendant appeared and entered a motion to amend the decree so as to exempt him from further payment of alimony, or to decrease the amount fixed by the decree. An affidavit of defendant sets forth, as the grounds of the motion: first, a material decrease in the amount of his income since the rendering of the decree, and financial embarrassment occasioned by incumbrances upon his property; and second, the subsequent marriage of complainant. Complainant resisted the motion, and filed her own affidavit, in which she stated, first, facts tending to show the financial ability of defendant to continue to pay the alimony awarded her by the original decree, and second, that the income of her present husband, after discharging other obligations resting upon him, is insufficient to afford her an adequate support. On the hearing of the motion the court made an order modifying the original decree in such manner as to absolve defendant from further payment of the alimony ordered by the original decree, and in lieu thereof it was decreed defendant, from that date, should pay complainant one dollar annually, to be paid at the end of each year. A counsel fee was allowed complainant to resist the motion to reduce her alimony.

An appeal was taken by complainant from that decree to the Appellate Court for the first district. The errors assigned call in question the correctness of the judgment of the Circuit Court in amending the original decree in respect to the alimony allowed, and in reducing it to a nominal sum. Cross-errors were assigned: first, as to the allowance of a solicitor's fee to the party resisting the motion, and second, in not making such decree retroactive, so as to suspend the payment of alimony after the first day of February, 1880, on account of the previous marriage of complainant. The Appellate Court reversed so much of the order of the Circuit Court as absolved defendant thereafter from paying alimony as required by the original decree, and giving complainant in lieu thereof one dollar a year, but in other respects affirmed the order or decree of the Circuit Court. An appeal was granted to defendant on a single question, viz.: Whether the subsequent marriage of complainant, *ipso facto*, entitled defendant to have the alimony provided in the original decree reduced to a nominal sum, complainant's husband being unable to provide her with a suitable support, and defendant being

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able to pay the amount fixed in the original decree — the court being of opinion such question is involved in this case, and is of such importance on account of principal and collateral interest, that it should be passed upon by the Supreme Court.

The Appellate Court, by its judgment, assumed to find certain facts: first, that defendant is the owner of a large estate derived from his father, who is deceased, and has means out of which he might comply with the original decree as to alimony; and second, that since the rendering of the original decree, complainant, on January 14, 1880, married a man by the name of Eldridge, who works upon a salary of \$75 per month, out of which he has to support an aged mother, and that he is unable to support complainant. It will be observed this is not a case where the finding of facts by the Appellate Court, although embodied in and made a part of its judgment, is conclusive on the Supreme Court. The Practice Act has not so provided. In all chancery cases this court may look into the record and ascertain what facts are established by the evidence. The rule as to the practice in such cases has been settled by repeated decisions of this court.

On looking into the record it is seen the testimony concerning disputed facts is contained in *ex parte* affidavits — a most unsatisfactory mode of eliciting the truth as to any question of fact. It is shown, defendant's income is now much less than when the alimony was fixed by the original decree, and that his property is so heavily incumbered as to cause great financial embarrassment. It is admitted the income of complainant's husband is \$75 per month, but it is not proven that sum is not sufficient to enable him to afford her a suitable support, considering the social position she occupies. It certainly cannot be declared, as a fact generally known, that it is not. It may therefore be assumed, for the purposes of the decision of the question involved, as the same is certified to this court, that defendant is able to pay the alimony provided in the original decree, and that complainant's husband is able to afford her a reasonable support, every way suitable and corresponding with the position the parties occupy in social life.

The question presented has not before arisen in this State, and the court is left free to determine it as one of first impression, by the aid of such discussion as may have been given to it by other courts whose judgments are entitled to respect. The jurisdiction of the court to grant the relief sought is expressly conferred by

statute, which provides, the court in which any divorce is decreed may make such order touching alimony and maintenance of the wife, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just, and may on application, from time to time, make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper. Although our statute vests courts granting divorces with large discretion in respect to the allowance of alimony, and in the making of such alterations concerning the same as shall appear to be reasonable and proper, it is understood to be a judicial discretion, subject to review in an Appellate Court, so that there may be no abuse of that discretion with which courts are clothed in such matters, and to the end that justice may be done. The Circuit Court was of opinion the subsequent marriage of complainant so changed the relations of the parties as to make it reasonable and proper to reduce the alimony granted by the original decree to a nominal sum, and so decreed. That decision finds sanction in considerations that affect vitally the best interests of society, and conserve a sound public policy.

Alimony is that allowance which is made to a woman on a decree of divorce for her support out of the estate of her husband. At common law it was usually settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. The practice in our courts follows closely the practice in the English courts in that respect. Underlying all rules of practice to which long usage has given the consistence of law may be found some reason that satisfies the common judgment of their justness. Accordingly it is found the principle on which alimony is given to the divorced wife is, it is the equivalent of that obligation implied in every marriage contract, the husband shall furnish his wife what shall be deemed a suitable support, corresponding in degree with his pecuniary ability and social standing, and from any further performance of his marital obligation in that regard he is absolved by the decree of divorce. Our statute is silent as to when and for what cause the husband may be relieved from further payment of alimony imposed by the decree. In the absence of legislation the question remains for the decision of the courts. Of course the decease of the beneficiary operates to suspend all further payment of alimony. It is for the obvious reason it is no longer necessary for her support. The personal representatives were never permitted to recover any portion of the sum decreed, except such sum or installment thereof

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as had become payable in her life-time, and which remained unpaid at her death. Reasoning from analogy, it would seem that when, for any cause, the alimony decreed becomes unnecessary for the support of the wife, or when circumstances transpire that make it inequitable she should have further allowance, it would be reasonable and proper for the court to absolve the husband from the burdens imposed by the decree. This the court has ample power to do under our statute.

It would be difficult to suggest or conceive any cause that would present grounds more "reasonable and proper" for suspending further payment of alimony than the subsequent marriage of the divorced wife. The impression made by the doctrine of the common law, that by marriage husband and wife are one person in law, has not been entirely removed from the mind by modern legislation. The obligation implied in the marital relation resting on the husband to support his wife remains, having all the binding efficacy it had at common law. Courts of equity will be slow to change that obligation in any case from the husband to another man, although he may once have been the husband of the wife. Aside from its positive unseemliness, such a policy finds no support in any equitable consideration. Treating alimony, as may be done, as the equivalent of that obligation for support which arises in favor of the wife out of the marriage contract, and which is lost when that contract is annulled by the decree, she obtains the same obligation for support by a second marriage. It is unreasonable that she should have the equivalent of an obligation for support by way of alimony from a former husband, and an obligation from a present husband for an adequate support at the same time. It is illogical as well as unreasonable. It is her privilege to abandon the provision the decree of the court made for her support under the sanctions of the law, for another provision for maintenance which she would obtain by a second marriage, and when she has done so the law will require her to abide her election. There is no reason why she should not do so. Conforming closely with this view of the law are the following cases, in which questions analogous with the one involved were considered: *Albee v. Wyman*, 10 Gray, 222; *Bowman v. Worthington*, 24 Ark. 522.

All the cases referred to as holding doctrines contrary to the views here expressed, have been carefully examined. It is not perceived that any of them are directly in point, unless it is *Shephard*

v. *Shephard*, 1 Hun, 241. The reasoning of the court in that case, on the question involved in this decision, is neither conclusive nor satisfactory.

Forrest v. Forrest, 3 Bosw. 661, is upon a question that does not come within the range of this discussion, nor was the effect of a subsequent marriage of the wife upon her alimony discussed when the *Forrest* case was before the Court of Appeals, 25 N. Y. 501.

Miller v. Clark, 23 Ind. 870, holds that arrears of alimony decreed by a court in favor of a divorced wife, under the statutes of that State, may be collected after her death by her administrator. Exactly the same question was considered by this court in *Dinet v. Eigenmann*, 80 Ill. 274, and the same conclusion reached.

Perkins v. Perkins, 12 Mich. 456, holds that the section of the statute of that State which provides that after decree for alimony the court may from time to time, on the petition of either party, revise and alter such decree, must be construed as only authorizing the change on new facts thereafter transpiring, which are of such a character as to make the change necessary to suit such new state of facts; and in so far as that case can have any possible application to the case in hand it is fully indorsed.

It is said the policy of the law favors rather than restrains marriage, and the suggestion of counsel is if the subsequent marriage of the wife shall be held to suspend the further payment of alimony by the former husband, it is in restraint of marriage, which is forbidden. It is not perceived there is any force in the argument on this branch of the case. Pension laws suspending further payments to widows, on account of subsequent marriage, have existed many years, and no suggestion was ever made they operated in restraint of marriage, nor is it understood how such laws could have any such effect. Pensions are no doubt granted under the belief they furnish, in some degree at least, that support which it is supposed the husband would have rendered to the wife if living, and which is lost to her by his death. On her subsequent marriage she simply abandons the provision which the law humanely made for her, for a support which she has a right to expect she will receive from her second husband. That is precisely the case as to alimony. The divorced wife abandons the provision made for her support out of the estate of her former husband by the decree of the court, for that adequate support which she contracts for by the subsequent marriage. It is a matter that affects her own happiness, and about which she is per-

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fectly free and competent to make a choice. Whether she acts wisely in her election, or whether in every instance she obtains as good or as adequate a support by her marriage as that which she abandoned, are questions about which courts can have no concern. It is a matter of her own voluntary election.

There was no error in the Circuit Court in refusing to make its decree retroactive, so as to cut off alimony that had previously accrued. As respects the allowance of counsel fees to complainant in resisting the motion for the reduction of her alimony, the court acted within powers conferred by the statute, and the fees allowed are not unreasonably high.

The judgment of the Appellate Court will be reversed and the cause remanded, with directions to that court to affirm the decree of the Circuit Court in all things.

Judgment reversed.

NOTE BY THE REPORTER.—In this case in the Appellate Court, 7 Bradw. 524, the court asked: "Is the mere fact that plaintiff, two years and a half after the decree of divorce, married again, but to a man unable to support her, sufficient to justify a court of equity, acting upon the principles of natural justice, to thus interfere with a party so culpable, and against one otherwise so entirely blameless?" And continued: "No other reason for it is conceivable, but one or all of the following: (1) That equity regards the obligation of the husband to provide alimony for the wife, after separation for his delinquency, as only nominal, and a sort of unjust burden, so that the court should seize upon slight circumstances, even upon a mere supposititious supply from some other source, as a sufficient reason for relieving the defendant from such burden; or (2) That even after divorce she owed him certain duties, among which was that of remaining single during the reception of support from him, so that the loss of said support should follow a breach of that duty by way of forfeiture, or (3) That equity instead of favoring marriage favors restraint of marriage." And they concluded: "In order to work out the ends of justice, courts of equity sometimes will regard those things as done which ought to be done. But it would be a perversion of the doctrine to the purposes of injustice to apply it in favor of the wrong-doer and against an injured innocent party, for the purpose of relieving the former from a just obligation to the latter. The statute provides no restraint upon the wife re-marrying, but authorizes the court to allow her to resume her maiden name, thus improving her marriageable condition, and if the doctrine of the court below is to be engrafted upon the law by the courts, then the statute providing for alimony will operate as a restraint upon marriage, which is against the policy of the law. The true rule, as it seems to us, is that while the re-marriage of the wife might be *prima facie* or presumptive evidence that she had acquired other means of support, yet it is not conclusive; and when it is made to appear that actually she did not, then such marriage affords no ground for relieving the former delinquent husband from the alimony provided in the decree, or for reducing it to a mere nominal sum." WILSON, J., dissented. In *Forrest v. Forrest*, 3 Bosw. 661, the court said, *obiter*: "What she may do after she has been divorced and the marriage relation has been dissolved by reason of his adultery can affect no matrimonial engagement, for none exists; nor violate any matrimonial duty, for she no longer owes any to her former husband." In *Shepherd v. Shepherd*, 1 Hun, 240, it was held that on the re-marriage of the wife, even when her second husband had an income of \$2,500 per year, as a salary, but it appearing that the defendant's ability was ample and she needed the allowance, the allowance would not be disturbed. On the other hand, Bishop says, 2 Marr. and Div. 479: "Though the second marriage is no violation of duties, moral or legal, and is in-

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deed a thing which the law approves, yet it has provided the wife with a new source of support, and thus has wrought a change in the condition and circumstances of the parties." In *Albee v. Wyman*, 10 Gray, 222, the court say: "The application for divorce and alimony was her own affair, a voluntary act, of hers, instituted for her benefit. So long as she remained unmarried, no ground existed for lessening the amount of such alimony. By her subsequent marriage she secured herself other resources for her support, and thus voluntarily furnished the ground for the reduction of alimony." In the principal case in the Appellate Court this is distinguished on the ground that it did not affirmatively appear that the wife had not secured other resources for her support. In *Bowman v. Worthington*, 24 Ark. 522, where the wife contracted a second marriage, the Supreme Court of Arkansas held that when a divorced wife marries again, she has no right to alimony or support from her former husband, either during his life or after the death of the second husband. In *Fisher v. Fisher*, 2 Swabey & Tristram, 411, SIR CRESSWELL CRESSWELL says: "If she avail herself of the freedom conferred by the decree of this court, and marries again, it would be unreasonable to compel the former husband to support her."

COON V. PEOPLE.

(99 ILL. 368.)

Evidence — leading questions — new trial.

On a criminal trial and conviction, where the only evidence against the defendant was the testimony of two girls, nine and eleven years old respectively, and leading questions were allowed to be put to them under objection, *held*, that a new trial should be granted.

CONVICTION of assault with intent to commit rape. The opinion states the case.

Brown & Beers, for plaintiff in error.

James K. Edsall, attorney-general, and *James R. Flanders*, State's attorney, for people.

DICKEY, J. In this case, the proofs are far from satisfactory as a foundation for the conviction of the accused of any offense known to the law as crime. It is not necessary however that the sufficiency of the evidence to that end should be discussed or determined, as the judgment must be reversed for errors as to the law.

The only witnesses for the prosecution, who make any statements tending to show any conduct on the part of the accused, which in any sense can be held to constitute crime, are two little girls, one of them eleven years old and the other nine. Against the objection

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of the counsel for the prisoner, the court permitted a series of leading questions to be put to each of these witnesses, and to be answered. The questions and answers referred to relate to most material parts of the accusation. In fact, on a careful reading of the bill of exceptions, it appears that very nearly every portion of testimony imputing even improper conduct to the accused is expressed by the words "yes" and "no," made as answers in every instance, to questions directly indicating that the answer given was the answer sought by the prosecution. It is said that the tender years of the witnesses rendered it allowable to pursue this course of examination. It is true that leading questions may lawfully be resorted to under certain circumstances, as where the propounding of general questions has been tried and there has been a failure to get specific answers, either by reason of the stupidity of the witness or of a disposition to prevaricate, developed by an examination upon such general questions, and in perhaps some other special cases. It is a question on which the court should exercise a sound discretion. The general rule however is that leading questions are improper, and this general rule ought not to be departed from unless for some proper and apparent cause. No such cause is shown here. The tender age of these witnesses, instead of furnishing a good reason for departing from the rule with some apparent necessity, did in fact furnish a cogent reason why leading questions should not have been permitted; for we all know that children of such age are usually more liable to be misled in that way than are witnesses of more mature years. We do not say that leading questions may not, under some circumstances, be permitted, properly and lawfully, nor is it intended to decide that the erroneous toleration by the court of leading questions will, in all cases, constitute sufficient cause for reversing the judgment of such court; but in a case like this, where the statements of the witnesses are under the circumstances very improbable and well nigh incredible, and where the leading questions complained of relate to the most vital points of the inquiry, and where no reason or necessity for resort to such questions is made to appear, and where it is plain that it is an abuse of the discretion of the court, we feel compelled to reverse, and for that cause alone.

[Omitting minor matters.]

Judgment reversed.

Cope v. District Fire Association of Flora.

COPE V. DISTRICT FIRE ASSOCIATION OF FLORA.

(99 Ill. 489.)

Injunction—to restrain gambling on fair ground.

In absence of proof of pecuniary injury to the complainant or the association, an injunction will not issue at the suit of a stockholder in an incorporated fair association, to restrain the company and its officers from permitting gambling on the grounds for a pecuniary reward.

SUIT for injunction. The opinion states the case. The injunction was denied below.

Rufus Cope, in person.

Gershom A. Hoff, for appellee.

MULKEY, J. The question presented for our determination by the record in this case is, will an injunction lie at the suit of a stockholder in an incorporated fair association, restraining the company and its officers from permitting, for a pecuniary reward, gamblers to congregate and ply their vocation upon the grounds of the company, during its annual exhibitions, where it does not appear, from the bill or otherwise, that the complainant or the company has thereby sustained some pecuniary injury or loss.

The Circuit Court of Clay county and the Appellate Court for the fourth district have both answered this question in the negative, and we think properly.

It is no part of the admission of equity to administer the criminal law of the State or to enforce the principles of religion and morality, except so far as it may be incidental to the enforcement of property rights and perhaps other matters of equitable cognizance. High on Inj., § 23.

The licensing of gambling tables by the officers of the company cannot in any sense be regarded the act of the company. It is foreign to the objects and purposes of the association and is clearly *ultra vires*, and the officers alone are responsible unless authorized by the stockholders, in which case it would doubtless be such an abuse of the company's franchises as would warrant the State in reclaiming them. Gambling, such as that complained of, is a viola-

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tion of the criminal code, which affords ample means for its suppression.

If the bill in this case showed any pecuniary loss or injury, it would present an entirely different question; but nothing of that kind is claimed or pretended, and we are aware of no principle upon which such a bill can be maintained, and counsel has failed to suggest any or furnish us with any precedent where such a bill has been sustained.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

KENLEY V. HUDELSON.

(99 Ill. 493.)

Homestead—wife separated from husband.

A wife, permanently separated from her husband by agreement, after his neglect to support her, may acquire a homestead.*

BILL to cancel a deed. The opinion states the point. The bill was dismissed below.

F. G. Cockrell, and H. H. Chesley, for plaintiff in error.

Hayle & Finch, for defendants in error.

CRAIG, C. J. This record presents two questions: First—whether the complainant, a married woman, can hold a homestead in premises purchased after she and her husband had separated, and while the husband was still living.

Second—If complainant was entitled to a homestead in the premises, had she lost the right of homestead by abandonment?

The complainant, Margaret Kenley, a widow with several small children, about seventeen years ago married Henry Kenley, and resided with him one year and six months, when the parties, not being able to live together on friendly terms, separated, and have never resided together since the separation. The complainant had one child as the fruit of the second marriage, and when the sepa-

* See *Kessler v. Draub* (52 Tex. 575), 36 Am. Rep. 727, and note, 728.

ration was had, complainant agreed to keep the child, and relinquish all interest she had in her husband's lands, and her husband gave her the sum of \$600. It was understood and agreed that the separation should be final, and since it occurred the husband has contributed nothing to support the complainant, but she has supported herself and family by her own exertions, and lived separate and apart from him. The complainant purchased the premises in question in 1870, from money derived from her first husband's estate, and after the purchase she moved on the property with her children, and resided thereon five or six years, when she rented out the land and moved to a small town near by, for the purpose of schooling her son.

The statute provides that every householder having a family shall be entitled to an estate of homestead, to the extent in value of \$1,000, in the property occupied as a residence. There is no dispute in regard to the fact that complainant was a householder with a family, nor is it claimed that the premises exceeded in value \$1,000; but the position of the defendants, as we understand it, is, "while the husband lives, and the relation of husband and wife continues, the husband not having deserted or abandoned his family, no claim to a homestead can exist in the wife. It is for him, while living, to claim, if he chooses. If he does not, she cannot. It is her duty * * * to reside with him; his domicile, in law, is hers." There is no doubt that where questions in regard to a divorce arise under our statute in reference to divorce, the domicile of the husband is the domicile of the wife, and the residence of the wife follows that of the husband, as held in *Ashbaugh v. Ashbaugh*, 17 Ill. 476; *Davis v. Davis* 30 id. 180; *Kennedy v. Kennedy*, 87 id. 250.

But while it may properly be held, as was done in the case last cited, that the residence of the wife follows that of the husband, and when a husband acquires a new home it is the duty of his wife to go with him, and if she refuses without justification for two years, he will be entitled to a divorce on the ground of desertion, yet it is manifest on a moment's reflection the doctrine announced can have no application whatever to a case where a wife may be asserting a homestead in premises occupied by her while she is residing separate and apart from her husband. It is true complainant and her husband were not divorced, but at the same time they had separated finally, and she had for years supported herself and her family by her own exertions.

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In *Love v. Moynahan*, 16 Ill. 277, it was held, that where the husband compels the wife to live separate from him, either by abandoning her or by forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious but permanent, and without expectation of again living together, and the wife is unprovided for by the husband, she may acquire property, control her person and acquisitions and contract, and sue and be sued in relation to them as a *feme sole*, during the continuance of such condition.

If the wife, after a permanent separation, has the right to control her acquisitions as a *feme sole*, she doubtless could, if she had acquired a homestead, hold it as against a creditor. It is perhaps true, where the husband and wife are residing together, and a homestead is claimed, the husband is ordinarily the proper person to assert the right, and in such a case a homestead could not properly be set off to the wife; but where a final separation has taken place, no reason exists which would prevent a wife from claiming a homestead in premises acquired, as well as if she was sole and unmarried. Upon an examination of the statute it will be found that the protection of the act is not extended to a husband, or to the head of a family, but on the other hand the law declares that every householder having a family shall be entitled to an estate of homestead. Here the complainant was a householder and the head of a family, and the statute will have to receive an unnatural and a forced construction to hold that she is not entitled to protection, when she falls directly within its terms. The fact that complainant had a husband living is not sufficient to deprive her of the rights given by the statute to a householder having a family. Her husband had refused to provide her with a home and with support. True the separation was agreed upon, but it is apparent they could not live together in peace, and that he failed to provide her with a home as it was his duty to do. Under such circumstances after the separation she had the right to acquire and hold property in the same manner that she would had she been divorced, and when she purchased the premises in question and occupied the same as a homestead with her family, she has the same right to claim the protection of the statute as any other householder.

[Omitting the other question.]

The decree dismissing the bill will be reversed and the cause remanded.

Decree reversed.

SCHUCHARDT V. PEOPLE.

(99 Ill. 501.)

Statute — construction — “ occupation ” — woman as master in chancery.

Under a statute providing that no person shall be precluded or debarred from any occupation, profession or employment on account of sex, a woman may be a master in chancery. (*See note, p. 86.*)

QUO WARRANTO. The opinion states the point. The complainant had judgment below.

M. C. Crawford, and Sidney Grear, for appellant.

SCHOLFIELD, J. The single question is presented by this record, whether a female is, by reason of her sex alone, disqualified to hold the office of master in chancery.

The origin and duties of that office are thus explained by Bouvier's Law Dictionary, p. 121, title, “Masters in Chancery:” “The chancellors, from the first, found it necessary to have a number of clerks, were it for no other purpose than to perform the mechanical part of the business, — the writing. These soon rose to the number of twelve. In process of time this number being found insufficient, these clerks contrived to have other clerks under them, and then the original clerks became distinguished by the name of master in chancery. He is an assistant to the chancellor, who refers to him interlocutory orders for stating accounts, computing damages, and the like. Masters in chancery are also invested with other powers, by local regulations. Vide Blake's Ch. Pr. 26; 1 Madd. Pr. 3; 1 Smith's Ch. Pr. 9, 19.”

By our statute (Rev. Stats. 1874, p. 697, title “Masters in Chancery,” § 6), “masters in chancery, in their respective counties, shall have authority to take depositions, both in law and equity, to administer oaths, to compel the attendance of witnesses, take acknowledgments of deeds and other instruments in writing, and in the absence from the county of the judge, to order the issuing of the writs of *habeas corpus*, *ne exeat*, and injunction, and perform all other duties which, according to the laws of this State and the practice of Courts of Chancery, appertain to the office.” The seventh section of the same chapter also empowers masters in chancery to award the issuing of writs of *certiorari*.

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It would seem quite clear therefore there is nothing in the origin of the office, or in the nature of the duties to be discharged, which renders it impossible that a female should fill the office.

Our Constitution does not forbid females holding offices of this character, — and there is no such prohibition to be found in any statute.

At common law, females were incompetent to be attorneys at law, and to hold office, in general. At our September term, 1869, Mrs. Myra Bradwell applied to this court for a license to practice as an attorney and counsellor at law, and her request was refused, because of her sex; and in the opinion then filed it was, among other things, said: “If it be desirable that those offices which we have borrowed from the English law, and which, from their origin, some centuries ago, down to the present time, have been filled exclusively by men, should also be made accessible to women, then let the change be made, but let it be made by that department of the government to which the Constitution has intrusted the power of changing the laws.” *In re Bradwell*, 55 Ill. 535.

Presumably in response to this, the general assembly passed an act, which was approved on the 22d of March, 1872, the first section whereof is in these words: “That no person shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex: *Provided*, that this act shall not be construed to affect the eligibility of any person to an elective office.” Rev. Stats. 1874, p. 478.

The word “profession” was doubtless intended to, and certainly does, cover the exact case involved *In re Bradwell, supra*, and that word is not, in its commonly accepted signification, appropriate to describe the occupancy of a public office. But “occupation” is a generic term, and includes every species of that *genus*, — and holding or discharging the duties of a public office in one species of occupation, just as carpentering, tailoring, farming, etc., are other species of occupation. Webster, in defining “occupation,” mentions “office” as synonymous with “avocation,” “engagement,” “calling,” “trade,” etc., and as hence being embraced within the definition of “occupation.” See Unabridged Dictionary, titles “occupation” and “office;” and to the same effect is Roget’s “Thesaurus of English Words,” 625.

The saving clause embraced by the *proviso* shows that it was supposed by the general assembly, in the enactment of this statute,

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that "occupation" includes the discharge of the duties of a public office, — for, otherwise, there could not have been the slightest imaginable necessity for that clause. Because the eligibility of women to office generally — *i. e.*, to all offices — was presumed to be affected, it was necessary, in order to confine the effect of the statute to offices filled by appointment only, to expressly say, "this act shall not be construed to affect the eligibility of any person to an elective office," — but (implication) it may affect, that is to say will affect, those to be filled by appointment, by allowing women as well as men to be appointed.

In our opinion appellant was eligible, and her appointment valid.

The judgment of the Appellate Court is reversed, and the cause remanded, with direction to that court to reverse the judgment of the Circuit Court, and remand the cause to that court for further proceedings consistent with this opinion.

Judgment reversed.

WALKER, J., dissenting.

NOTE BY THE REPORTER.—In *Evans v. Ives*, Penn. (Lackawanna) Common Pleas, Oct. 1881, it was held that in the absence of an express restriction to men a married woman may be an arbitrator. The court said :

"In West's Symbollography, 163, it is said that a married woman cannot be an arbitrator. This however is the rule of the civil law. Justinian says that it is contrary to the proper character of the sex to allow women to intermeddle with the office of a judge. Kyd's Award, 71 ; Wood's Civil Law, 327. In Kyd on Awards, 70-1, it is said that an unmarried woman may be an arbitrator. To sustain this the author cites the *Duchess of Suffolk* case, 8 E. 41 ; Br. 37.

"In 2 Petersdorff Abr. 129, it is said that it is no objection to an award that the arbitrator is a married woman. Gentlewomen have also held and exercised judicial authority. Anne, countess of Pembroke, held the office of sheriff of Westmoreland and exercised the duties thereof in person. At the assizes of Appleby she sat with the judges on the bench. Hargr. Co., Lit. 826 ; 8 Bac. Abr. 661. Her right to sit upon the bench as a judge will be fully understood when it is borne in mind the sheriffs at that time held court and exercised judicial power. Sheriffs had power to inquire of all capital offenses and issue process and enforce the same. But this power was afterward restrained. By Magna Charta, chapter 17, it was enacted 'that no sheriff shall hold pleas of the crown.' 8 Bacon's Abr. 688.

"Eleanor was appointed Lord Keeper of England. It would seem from the history of this noble woman that she actually performed the duties of lord chancellor in person. It is said of her that in the summer of 1235 King Henry appointed her lady keeper of the great seal. She accordingly held the office nearly a whole year, performing all the duties, as well judicial as ministerial ; she sat as a judge in the *Aula Regia*. These sittings were however interrupted by the *accouchement* of the judge when she was delivered of a daughter. After retiring from the bench and the appointment of her successor she was delivered of a boy, who afterward became Edward I. of England. 1 Campbell, L. L. Ch. 134-9. Without referring in any manner to Eve, the first arbitrator appointed in this world to decide the controversy about eating the forbidden fruit, or to the manner Deborah judged Israel, we are clearly of the opinion that under the act of 1886 a woman, married or single, may be appointed arbitrator and may act as such and make a valid award."

An unmarried woman may be an arbitrator. *Duchess of Suffolk's* case, Year Book, 8 Edw. 4, 1 ; 1 Br. 37. By the civil law she could not, it being contrary to the proper character of

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the sex, according to the ideas of Justinian, to intermeddle with the office of a judge. Code, 1, 2, tit. 56, § 6.

A married woman may not be an arbitrator, for the reason that she is supposed to be under the control of another. Com. Dig. Arb. C.

"At the coronation of King Henry IV, Thomas Dymocke officiated as champion in right of his mother, Margaret. The office of a justice of the forest was anciently executed by a woman. Margaret, countess of Richmond, mother to King Henry VII, was a justice of the peace. Lady Bartlett was commissioned a justice of the peace by Queen Mary in Gloucester. And one Rowse, in Suffolk, did usually sit upon the bench at Assizes and Sessions, among the justices, *gladio cincta*. (Harl. Ms. No. 980, 166.) * * * That they frequently filled judicial situations superior to those already enumerated is also certain. Complaint was made in the 18th of Richard II, that men were compelled to answer before 'divers lords and ladies' for their freeholds and other matters cognizable at common law; and in consequence a remedy for this abuse was given by petition in Chancery. (Stat. 15 Rich. II, c. 12.)" 10 Retrospective Review, pp. 94-95, 98. "The clerkship of the crown, in the King's Bench, has been granted to the fair sex." Id. 110.

A woman was chosen sexton by election, and succeeded by votes of females that were counted and allowed for her. *Olive v. Ingram*, 2 Str. 1114. The court had no difficulty about her being capable of the office, there having been many cases where offices of greater consequence had been held by women, and there being many women sextons in London. Spelman's Glossary, 497. The reason for holding that a woman could hold the office of sexton is quaint, namely, it being an office that does not concern the public, nor the care and inspection of the morals of the parishioners. Lee's words (Campb. Chief Justices, vol. 8, 1067) are: "Whose duties do not concern the morals of the living, but the interment of the dead." Another reason was that there was no usage excluding a woman from the office. The candidates were a man and a woman, and strange to say the male and the female voters divided their votes. Olive was the male candidate, and had votes from males, 174, from females, 22, or 196 in all. The woman candidate had votes from males, 160, from females, 40, or 200 in all. Chief Justice Lee, in giving judgment, said a woman had been queen, marshal, great chamberlain, great constable, champion of England, commissioner of sewers, keeper of a prison, returning officer of members of Parliament, etc.

In *The King v. Stubbs*, 2 T. R. 305, the question was whether a woman might hold the office of overseer of the poor. Counsel argued against the right as follows: "There are some parts of the duty of that office which are inconsistent with the decency of the sex. It is the province of the overseers to make all inquiries relative to bastards, and to carry the persons charged before a magistrate for the purpose of obtaining an order of bastardy: which at a tender age may be prejudicial to the morals and inconsistent with the decency of females. Neither have they strength of body or knowledge equal to the station." "As to the queen of England it is sufficient to say that of all stations there is not one perhaps which requires less personal exertion than this." "With respect to the instance of the commissioner of sewers, it is merely the opinion of Callis, for which he gives the absurd reason, that Semiramis governed Syria." As to the office of sexton he said: "If there were anything to be done by the sexton, not proper for a woman, it would be otherwise." But the court held that the woman might be sexton, seeming however to put it on the scarcity of men, observing: "Where there are a sufficient number of men qualified to serve the office, they are certainly more proper; but that is not the case here; and therefore if there be no absolute incapacity, it is proper in this instance from the necessity of the case."

A woman was held capable of being governor of Chelmsford workhouse (*Anon.*, 2 Ld. Raym 1014), the reason seeming to be that she might act by deputy. She might be keeper of the gate-house. *Lady Broughton's case*, 8 Keb. 32. The gate-house was a prison; she was committed on complaint of the prisoners, the information being for "extortions and crimes." She was fined 100 marks and removed from office, but the office was saved to her lessors. In the *Duke of Buckingham's case*, Dyer, 285, it was held that two single women could exercise the office of constable. Lady Packington was returning officer for boroughs. Brady's Hist. of Boroughs. As to women voting, see 4 Inst. 5, cited to show that they could not vote for members of Parliament or coroners.

In *Robinson's case*, 24 Alb. Law Jour. 448, Chief Justice GRAY giving the opinion, the Massachusetts Supreme Court held that a woman cannot be an attorney at law in

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Massachusetts. The chief justice observed: "The office of sheriff was partly judicial and partly ministerial; the judicial functions could not be delegated; but the ministerial duties, including that of attendance upon the judges, might be performed by deputy. When such an hereditary office descended to a woman she might exercise the office by deputy (at least with the approval of the crown), but not in person; nor could it be originally granted to any woman, because of her incapacity of executing public offices. Women were permitted to hold the office of keeper of a castle or jail, governor of a work-house, forester, constable, for the reason that each of those offices might be executed by a deputy. They were decided to be capable of voting for and of being elected to the office of sexton of a parish, upon the ground that this was not an office that concerned the public. And we are not aware of any public office, the duties of which must be discharged by the incumbent in person, that a woman was adjudged to be competent to hold, without express authority of statute, except that of overseer of the poor, a local office of an administrative character, in no way connected with judicial proceedings."

In *Charlton v. Lings*, L. R., 4 C. P. 874, it was held that women cannot vote for members of Parliament, and that "man" in the statute does not include women. "The word man," counsel observed, "although sometimes used generically, as opposed to angels and beasts, is also used specifically as opposed to infants and women." In this case WILLES, J., says also that a peeress in her own right can neither sit nor vote by proxy in the House of Lords. He also alludes to the well-known law that women cannot sit on juries, except in certain cases of alleged pregnancy.

"The statute, 11 Edw. III, ch. 4, enacts that neither man nor woman who cannot afford to spend £100 a year shall wear furs. Barrington, in an ingenious note on this statute, cites it as the first instance in our law 'of an apprehension that a woman is not included under the word man.'" 10 Retrospective Review, 99.

In 115 Mass. 602, it was held by the judges, in answer to a question of the House of Representatives, that a woman may be a member of a school committee, there being nothing prohibitory in the Constitution. They said: "The common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them. The duties of a school committee relate exclusively to the education of children and youth in the city or town for which it is elected; they consist of the general charge and superintendence of the school, including the employment of teachers, the selection of school books, the regulation of the attendance of scholars, and the preparation of school registers and returns; and they are in no respect of such a nature that they cannot be well and sufficiently performed by women." The attorney-general of New York has recently given an opinion that a woman may be a school commissioner. So in *Huff v. Cook*, 44 Iowa, 639, of county school superintendents.

In *Minor v. Happersett*, 21 Wall. U. S. 162, it was held that a woman is a citizen, but as a citizen has no right of suffrage.

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(100 Ill. 242.)

Criminal evidence — dying declarations exculpating accused.

Dying declarations, not part of the *res gestæ*, are not competent in exculpation of the accused. (See note, p. 89.)

CONVICTION of manslaughter. The opinion states the point.

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Forrester & Felsenthal and *W. W. O'Brien*, for plaintiff in error.

Luther Laflin Mills, State's attorney, and *Henry Wendell Thomson*, assistant State's attorney, for people.

WALKER, J. [Omitting minor matters.] It is next urged that the court erred in excluding the declarations of deceased, made shortly before his death, in substance that he struck accused, and he was not to blame. They were made so long after the occurrence as to preclude all claim that they were a part of the *res gestæ*. They were therefore mere hearsay evidence, and were not admissible. Under the decision in the case of *Adams v. People*, 47 Ill. 376, they were not admissible as evidence. It was there said, the dying declarations of deceased, that "he did not wish accused hurt for what he had done, and that accused had done nearly right, etc., affords no evidence of any thing more than a truly Christian spirit on the part of one who had been unjustly done to death, and who in his dying agonies, was willing to forgive the malefactor."

[Minor matters omitted.]

Judgment affirmed.

NOTE BY THE REPORTER. — In the *Adams* case, *supra*, the declarations quoted were not of facts, but of opinion and desire. In that case the dying man in the same connection said that he had knocked down the accused three times before he retaliated, but the court ruled this out because the same fact abundantly appeared from other evidence. Bishop lays down the contrary doctrine (1 Cr. Law. § 1207): "Being admissible against defendants, they are consequently so also in their favor." Citing *Rex v. Scatfe*, 2 Lew. 150 *People v. Knapp*, 26 Mich. 112; *Moore v. State*, 12 Ala. 764. In *People v. Knapp*, *supra*, the court said: "The rule would be very unjust without this application."

NEW MARKET SAVINGS BANK V. GILLET.

(100 Ill. 254.)

Negotiable instrument — execution by agent.

A promissory note running "we, the trustees of the First Free Will Baptist Society of Chicago" — that being the correct corporate name — was signed by several with the addition, "Trustees of the First Free Will Baptist Society of Chicago, Illinois. Held, the note of the corporation and not of the individual makers.*

* See *Simpson v. Garland*, post.

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ACTION against defendants individually. The opinion states the case. The defendants had judgment below.

W. T. Burgess, for appellant.

Holden & Farson, for appellee.

SHELDON, J. The note sued on is as follows :

“\$8,300.

CHICAGO, 20th January, 1870.

“Eighteen months after date, we, the trustees of the First Free Will Baptist Society of Chicago, promise to pay James Longley, or order, \$8,300, with interest thereon, semi-annually at the rate of ten per cent per annum, payable at the Commercial National Bank of Chicago, Illinois.

Trustees of the First Free
Will Baptist Society of
Chicago, Illinois.

{ AARON P. DOWNS,
PAUL W. GILLET,
JOHN G. ELKINS,
BENJAMIN CHASE,
HIRAM WATTS,
PLEASANT AMICK,
WILSON F. BEHEL.
HENRY G. RICHWALD,
JOHN A. BARTLETT.”

The question made upon this record is, whether this note, as it purports upon its face, is the individual note of the persons signing it, or that of the corporation named therein.

Powers v. Briggs, 79 Ill. 493 ; s. c., 23 Am. Rep. 175, is cited by appellant's counsel as sanctioning the construction that the signers are individually liable. The form of the note there was this:

“\$600.

CHICAGO, May 17th, 1870.

“One year after date, we, the trustees of the Seventh Presbyterian Church, promise to pay to the order of H. G. Powers, \$600, value received, with interest at six per cent per annum.

A. H. BRIGGS,
LOUIS B. KELLEY,
JOHN CORBETT,
F. D. MARSHALL,
Trustees.”

There is a material distinction between the instruments in the

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two cases, and one well admitting a difference of construction. In the *Bowers* case, the name used in the body of the note was not that of the religious society there, their corporate name being "Trustees of the Society of the Seventh Presbyterian Church of Chicago," and the signature to the note was not the corporate name of the society, whereas, here the proper corporate name of the corporation on behalf of which defendant claims to have acted appears in the body of the note and the signature to it. Its name was "The Trustees of the First Free Will Baptist Society of Chicago." *Ada Street M. E. Church v. Garnsey*, 66 Ill. 133.

In no case which has been cited, nor in any other case of any such instrument which has ever previously been before this court, where there has been held to be individual liability, did the proper corporate name of the corporate body, as here, appear in the body of the note, and also appear signed to the note. In *Village of Cahokia v. Rautenberg*, 88 Ill. 219, the form was in the body of the note, "I promise to pay to," etc., signed by two individual names, with "School Trustees" added. In *Hypes v. Griffin*, 89 id. 134; s. c., 31 Am. Rep. 71, the note was signed and sealed with the hands and seals of certain persons, without any official or other designation whatever to their names.

The statute relating to the incorporation of religious societies, in force at the time this note was made, provided that "such society or congregation may assume a name, and elect or appoint any number of trustees, not exceeding ten, who shall be styled trustees of such society or congregation by the name assumed, and the title to the land purchased and improvements made shall be vested in the trustees, by the name and style assumed as aforesaid." The trustees and their successors are given perpetual succession, and are to sue and be sued, etc., "in and by the name and style assumed as aforesaid."

As to the proper mode of the execution of instruments in writing by such a corporation, this court has declared it to be by the use of the individual names of the trustees, with their corporate name appended, saying, in the case of *Lombard v. Chicago Sinai Congregation*, 64 Ill. 487, with reference to the execution of deed of land belonging to such a corporation, that "the sufficiency of the deed required that the individual names of the trustees should be inserted as grantors, with the addition of the words, 'Trustees of the Chicago Sinai Congregation.' * * * The concluding clause

should be, that the said parties of the first part, as such trustees as aforesaid, have hereunto set their hands and seals, or their official style should be added to their signature." And see *Ada Street M. E. Church v. Garnsey, supra*, that such a corporation must sue and be sued through its trustees.

So far as would respect the execution of a note on the part of the corporation, it is not perceived why the one in suit is not executed in conformity with the mode above directed; but as showing a failure so to do, stress is laid by appellant's counsel upon the following additional language which was there used, viz.: "The granting clause should witness that the said parties of the first part, as trustees of, for, and by the direction of the congregation aforesaid, for the consideration, etc., have bargained. In this respect the deed was not sufficiently certain." As to conveyances of real estate, the power to make them is, in terms, given only under the direction of the society or congregation, and thus the propriety that a conveyance of real estate should show on its face such direction. The remarks above in that case were with reference to a deed under the direction of a Court of Chancery, and as the kind, in form, of such a deed which a purchaser was entitled to require, it being said that it should be correct in form, and so executed as to show it upon its face to be free from all probable doubt or suspicion. The significance of the decision, as applied to the case in hand, is, that the mode of execution should be by the signature of the individual names of the trustees, with the addition thereto of their official style. All the observations with regard to a deed would not, of course, apply to a note. There is no granting or concluding clause in the latter; the name of the promisor need not appear therein at all; the signature thereof to the note is enough. The signature here is that of the corporate name of the corporation, and of that alone. The individual names of the trustees are no individual signatures or individual acts, but a component part of the signature of the corporate name, in the form that it is required to be made, under our own decision above in that regard.

It is said that the use of the word "we" in the note, in its connection, to wit: "we, the trustees," etc., leaves it doubtful on the face of the instrument who is bound. But how can this be? "We." is immediately followed by "the trustees of the First Free Will Baptist Society of Chicago," and that is the corporate name of a corporation. How can this pronoun denote any one else than the

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corporation whose corporate name immediately follows it? No one else is named in the body of the note nor in the signature to it, as the only name subscribed is the corporate name of the corporation, the individual names of the trustees being used only in connection with their official style, and their use in such connection being in the required mode of making a corporation signature, as laid down in *Lombard v. Chicago Sinai Congregation*.

It is then "we," the trustees of the First Free Will Baptist Society of Chicago, we, the corporation, by this our corporate name, who make the promise, and not "we," Aaron P. Downs and the eight other trustees whose names appear to the note. It might have been better to have omitted this word "we," and had it been omitted, the mode of the execution of the note, as a note of the corporate body, would appear to be unexceptionable in form. But it is usual in making promissory notes to use the personal pronoun of the first person singular or plural; and if it were to be used in this case, manifestly the plural would be more proper than the singular form, "we, the trustees," etc., than "I, the trustees," etc. The word "we" may not improperly be used to denote a corporation aggregate.

Another criticism which is made is that to make this a corporate act the word "as" should have been employed after the word "we," so as to read we as the trustees, etc., promise, etc., that that would have changed the word trustees from being a description of the person to a qualification of the act, making it the act of some one else. Where there is no other name or description appearing, either in the body of the note or in the signature to it, than that of the proper corporate name of the society, as appears here, the use of the word "as," in the connection named, should not be regarded as important to give to the transaction the character of a corporate act.

There is no occasion to advert to the various decisions involving the execution of written instruments by agents for principals, and where the agent or principal has been held bound according to the particular form in which the instrument may have been drawn and signed. They are not parallel cases with the one at bar. For its decision one need look no further than to our statute prescribing the corporate name of these incorporate religious societies, and what this court has laid down heretofore, that the use of the individual names of the trustees with the statutory corporate name appended, is the proper mode of the using of the corporate name in the execution of a written instrument, so as to bind the corporation.

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It would seem therefrom that this note was executed officially, not individually, that the signature thereto is that of the corporate name of the corporation, and none other, that the individual names of the trustees there, in the connection they appear, were not signed as individual acts, but in the performance of a corporate act, in order to the execution of the note in proper form as a note of the corporation, and that hence the note is that of the corporation, made by it under its corporate name, and not the note of the individual trustees.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

COUNTY OF JACKSON V. RENDLEMAN.

(100 Ill. 879.)

Municipal corporation — power to bind itself for interest.

A municipal corporation, authorized to contract for services and purchase of property, and unrestricted as to amount or mode of payment, may bind itself to pay by interest-bearing orders on its treasurer. .

ASSUMPSIT. The opinion states the case. The plaintiff had partial judgment, which was reversed by the Appellate Court.

W. A. Schwartz, for appellant.

Andrew D. Duff, for appellee.

SHELDON, J. This was a suit upon a county order issued by the board of county commissioners of Jackson county to Isaac Rapp, December 24, 1877. The order was drawn for the sum of \$500, "for work done on court-house, as per contract," payable "with interest at ten per cent per annum, payable annually." The Circuit Court rendered judgment for the plaintiff in the sum of \$500, refusing to allow interest upon the order. On appeal to the Appellate Court for the fourth district the judgment was reversed and the cause remanded, and on petition of the defendant the court granted an appeal to this court, making the requisite certificate.

The facts, as shown by the record, are, that about the 1st of June, 1877, the county board, having determined on certain repairs on the court-house of the county, including the building of two fire-

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proof vaults, caused notices to be published in a number of newspapers that sealed proposals for doing the work would be received by them until the 22d of that month; that the plans and specifications of the work were on file in the county clerk's office, and that the work would be paid for in county orders of the county, bearing interest at the rate of ten per cent per annum. On June 22d, on opening the numerous bids sent in under the notices, Isaac Rapp was found to be the lowest bidder, his bid being \$10,850. The board then awarded him the contract, on condition of his filing a bond, etc. On July 2d the board again met, and approved Rapp's bond, and unconditionally awarded him the contract for that sum, to be paid in the orders of the county, bearing interest at the rate of ten per cent per annum, and entered the same of record. The work was done, and the orders issued accordingly, of which the order in suit was one, which was duly assigned to the plaintiff. Rapp testified, that if the county had proposed to pay for the work in common county orders, he would not have undertaken the work at any price, and that no one would have done the work for less than \$6,000 or \$7,000 more than the contract price; that common county orders were then worth about sixty cents to the dollar, while these interest-bearing orders could be "handled" at ninety cents.

The liability of the county to pay interest on the order is the only question made upon the record.

By section 26, page 307, Rev. Stats., 1874, it is made the duty of the county board of each county, "to erect or otherwise provide, when necessary and the finances of the county will justify it, and keep in repair, a suitable court-house," etc., and "to provide and keep in repair, when the finances of the county permit, suitable fire-proof safes" for the county offices. By section 24, page 306, counties are given the power "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of their corporate powers."

In *County of Hardin v. McFarlan*, 82 Ill. 141, which was an action to recover the interest at ten per cent per annum on certain bonds which had been issued by the county of Hardin, this court said: "We fail to discover in any statute in force when these bonds were issued any power in the several county courts to issue interest-bearing orders, and we are satisfied no such power existed. The County Court could exercise no discretion in this matter, — it was controlled by positive law."

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But this language is to be taken with reference to the particular case in which it was used. The county of Hardin, there, had taken up an amount of pre-existing indebtedness, common non-interest-bearing county orders, and issued to the holders in lieu thereof the bonds there involved, payable with ten per cent interest per annum. There was at the time a law in force entitled, "An act to enable counties owing debts to liquidate the same," — the mode being by the levy of a special tax. And in *Hall v. Jackson County*, 95 Ill. 352, it was held that it was not within the powers of a county board to allow or pay interest on common county orders issued for current county expenses, referring to the *County of Hardin* case as so deciding.

The present is unlike the cases cited. The orders here were not issued for some prior indebtedness which had been incurred with no reference to being paid by interest-bearing orders, but they, with their interest clause, were the contract price which had been agreed to be paid for work afterward to be performed.

The county board certainly had authority to contract for the repair of the court-house and building the fire-proof vaults, and there being no restriction of law as to the amount of the price they should pay or its mode of payment, we do not see why it was not open to them to contract to pay in interest-bearing orders, as well as in non-interest-bearing orders. There is no prohibition against counties issuing interest-bearing orders, and this court has never decided that counties had no power, under any circumstances, to make a valid contract for the payment of interest. The cases cited above are the extent to which it has gone in that direction. The interest clause in the orders here was a part of the contract price of the work. It was under the agreement that the orders should bear ten per cent interest that the work was contracted to be done, and was performed. The interest provision regulated the amount of the price bid, and contracted to be taken, for the work. With such provision the county has got the work done at a less price than it would have done without it. The work has been done as it was contracted to be performed, and the contract price should be paid as it was contracted to be paid. We see no legal obstacles in the way of its being done.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WALKER, J., dissenting.

Kallenbach v. Dickinson.

KALLENBACH v. DICKINSON.

(100 Ill. 427.)

Limitation—payment by joint debtor

Part payment by one joint debtor, without the assent or knowledge of the others, before the statute of limitations has run against the demand, will not bind the others.*

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

E. S. McDonald and *McCrea & Ewing*, for appellant.

Ira J. Bloomfield, for appellee.

SCHOLFIELD, J. This case comes before us by appeal from a judgment of the Appellate Court for the Third District, affirming a judgment of the Circuit Court of McLean county. The action was assumpsit upon a promissory note, of which the following is a copy:

“\$424.20.

“Two years after date, for value received, we promise to pay Morris Kallenbach or order four hundred and twenty-four 20-100 dollars, and ten per cent interest.

June 3, 1861.

GOTTFRIED WENZEL,
ELIADA DICKINSON.”

Dickinson alone was served with process, and there was no appearance for the other defendant. Dickinson interposed the defense by proper plea that the cause of action did not accrue within sixteen years. The plaintiff replied that payments were made within sixteen years, and upon the issue thus formed the Circuit Court upon trial gave judgment for the defendant Dickinson.

Dickinson was in fact but a surety on the note, Wenzel being its maker and the principal debtor. Wenzel made several payments upon the note within the sixteen years, but these were neither expressly authorized by Dickinson before being made, nor ratified nor assented to by him afterward. The question is, do the payments

*See *Burgoon v. Blaker*, post.

thus made afford sufficient evidence of a subsequent promise by Dickinson, to remove the bar of the statute of limitations as to him?

The limitation act of 1845, upon which Dickinson relies, contains a clause providing that if any payment shall have been made, the period of limitation shall only run from that time forward. See Revised Statutes of 1845, p. 348, § 4. It does not say by whom such payment shall be made, nor as against whom only the period of limitation shall run, but leaves those questions to be determined by the principles of the common law. We do not regard the statute as asserting any new legal principles, but simply as enacting a principle of the common law that had been for many years applied by the courts in construing statutes of limitation. See Angell on Limitations, § 240, and notes.

In order that Dickinson shall be concluded by the payments of Wenzel, it must be determined that Wenzel was Dickinson's agent, not only for the purpose of liquidating the note by payment, but also for the purpose of doing what in legal estimation is necessary to make a new promise that will remove the bar of the statute.

The contention on behalf of the appellant is that the statute recognizes what his counsel assume was the common law at the date of its enactment, namely: that any payment on a note after its maturity, by one of several joint makers, enables the holder to bring suit against all the makers within the original period of limitation after such payment is made, and hereon hinges the controversy.

That the statute recognizes what was in fact the common law on this question at the date of its enactment is not, we think, fairly subject to controversy, but in our opinion, on reason, on the authority of the principles announced in decisions heretofore made by this court, and on the weight of modern decisions in other courts, and the authority of text writers, the common law rule was not as thus contended. The English courts generally we admit, since the decision in *Whitcomb v. Whiting*, Douglas, 652, have held to that effect, and a number of the courts of our sister States have, following the ruling in that case, likewise so held. But the question has never been directly passed upon by this court, and since *Whitcomb v. Whiting* arose under the act of twenty-first James I, and was not decided until 1781, however persuasive an argument it may be as to what the common law was upon that question, it cannot be conclusive upon us as an authority. We are free to inquire

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whether the reasoning by which it is supported is satisfactory, and to adopt or reject the rule it announces.

The entire opinion in *Whitcomb v. Whiting*, as delivered by Lord MANSFIELD, so far as it relates to this question, is as follows: "Payment by one is payment for all, the one acting virtually as agent for the rest: and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due."

The doctrine that the law raises a promise to pay from the mere act of admitting a debt to be due alone was in harmony with the prior decisions of the English courts. *Freeman v. Fenton*, Cowp. 548; *Bryan v. Horseman*, 4 East, 599; *Lawrence v. Worrall*, Peake, 93; *Beecher v. Harney*, 4 East, 599, N. C.; *Clark v. Brashall*, 3 Esp. 155.

It is said by the learned editors of Smith's Leading Cases, vol. 1, part 2, notes to *Whitcomb v. Whiting*, in speaking of that case: "But in truth this decision was based on a conception, which though inconsistent with the letter and spirit of the statute, prevailed for more than a century in the courts of justice, that if the presumption of payment arising from the lapse of time was rebutted by the acknowledgment or confession of the defendant, the end which the legislature had in view was sufficiently attained, and the plaintiff might recover without proving a cause of action within six years. It followed as a necessary consequence that if the debt was confessed to exist by any one competent to make such an admission, the acknowledgment would be equally good whether his authority did or did not extend to making a new contract, and as the admissions of one co-contractor are evidence against another, a payment or acknowledgment by either was, when viewed in this aspect, a good answer to the plea of the statute by both. *Davidson v. Turner*, 12 Ind. 223; *post*, vol. 2, *Bowerman v. Radenius*. The authority of the principal case continued to prevail after the principle on which it proceeded had been laid aside, and it was until recently the established rule in England that a joint debt may be revived by one of the contractors without the consent of the rest, and notwithstanding an express disclaimer on their part."

This court has uniformly adopted a different construction of the statute, and held that the mere confession or admission of a debt to be due, is not alone sufficient to remove the bar of the statute. Thus, in *Ayers v. Richards*, 12 Ill. 148, it was said: "In order to

take a case out of the statute of limitations, there must be a promise to pay the debt. Such promise may be implied, it is true, from an unqualified admission that the debt is due and unpaid, nothing being said or done at the time rebutting the presumption of a promise to pay. It is not sufficient that the debtor admitted the account to be correct, or that he had received the goods or the money, or had executed the note sued on, but he must have gone further and admitted that the debt was still due and had never been paid. The bare admission of the correctness of the account or genuineness of the note sued on is no more a satisfactory answer to the statute than would be the testimony of a witness proving the same facts. The statute presupposes the debt to have been due, and that there is no evidence that it has ever been paid. It would be absurd to say that a promise shall be implied by the bare admission of the party of what the law itself supposes to be true."

Again, in *Norton v. Colby*, 52 Ill. 202, it was said: "On this whole subject (*i. e.* the construction of the statute of limitations) a just reaction has taken place against the rulings of Lord MANSFIELD, which went so far to neutralize the beneficial purposes of the law. The modern doctrine, as laid down by this court in *Parsons v. Northern Illinois Coal and Iron Co.*, 38 Ill. 433, is that there must be either an express promise, or a conditional promise with performance of the condition, or such an unconditional admission of the justice of the debt as fairly to imply an intention and promise to pay." See also *Kimmel v. Schwartz*, 1 Ill. 216; *Keener v. Crull*, 19 id. 189; *Carroll v. Forsyth*, 69 id. 127; *McGrew v. Forsyth*, 80 id. 596.

And so in *Lowery v. Gear*, 32 Ill. 383, where the question arose as to the sufficiency of certain credits indorsed upon Gear's note by Brown, the original payee, to establish a new promise, it was said: "There must be an actual, affirmative intention to make a payment on the note, before we can infer the promise. It is a general rule no doubt that where a debtor makes a payment without designating to which of several claims it shall apply, the creditor may apply it to which he pleases; but this could not authorize Brown to so apply it as to bind Gear by an implied new promise, without the actual intention of Gear to make such a promise. This was a matter in which Gear must have had an affirmative intention, before he could be bound. His volition was indispensable in order to bind him. If he had no thought or intention one way or the other, even then

he could not be held to have made a new promise, for to do that he must have had an affirmative intention."

A parol promise reviving a debt has the same effect as payment under the statute. It revives or renews the debt so that the period of limitation commences anew to run from the date of the promise. In the case of a promissory note it operates as a new delivery of the note. *Sennott v. Horner*, 30 Ill. 429. In practical effect the parol promise or the payment operates as the creation of a new debt of the same character or dignity as the old.

In *Keener v. Crull*, 19 Ill. 189, it was said: "The statute bears the action and all remedy for recovery of the debt, and when the bar is complete, the statute being interposed in defense, no action for the recovery of the debt can be maintained. The debt however is not annihilated, and remains the same as before, excepting that all remedy for enforcement of the obligation is gone. The debt constituting an unquestioned moral obligation is however a good consideration to support a promise to perform that obligation, and a new promise based upon this moral obligation is binding upon the debtor in avoidance of the bar of the statute. * * * Were this a new question, we should hold that the action could alone be brought upon the new promise. But the current of authority and long usage sanction the practice of declaring upon the original cause of action and of replying the new promise."

In effect then *Whitcomb v. Whiting* has been repudiated by the decisions of this court, because they rest upon principles inconsistent with that decision. *Whitcomb v. Whiting* asserts no authority in a joint contractor to make a new contract, but merely that he has authority to admit that a prior contract exists, while we hold that to bind a party to a new promise there must exist the elements essential to a new contract, express or implied. There must be such circumstances as reasonably authorize an inference of an intention to waive the bar of the statute. There must be affirmative action or conduct designed to prospectively affect the rights of the parties to the prior contract. *Whitcomb v. Whiting* infers a new promise from the mere admission of the existence of a past contract, which doctrine this court repudiates.

It is doubtless the law that joint debtors, in matters respecting their joint indebtedness, may to a certain extent bind each other by their admissions; but this can only be as to facts affecting rights or remedies then existing. The admissions must relate to matters

showing what are the terms of a contract already made, or whether it has been performed or otherwise discharged. There can be no foundation in cases decided heretofore by this court, nor as we think, in reason, for asserting that two or more parties, by the simple act of becoming joint debtors, empower each other to act as their respective agents, any further than may be necessary to consummate that contract, which is only to pay or discharge the debt. To that extent all are bound, and there the duty and liability of each terminates. Each may doubtless affect the other by making admissions that would be competent evidence against him to the purport that the debt had not been paid or discharged, etc., but we are aware of no principle of law which sanctions the idea that a co-debtor, merely because he is such, has authority to bind his associates to a new contract, although it may be in regard to the old debt.

We have ~~held~~ held, even in the case of partners (in most respects a much stronger case than that of mere joint debtors), that after dissolution a single member cannot bind the firm by giving a promissory note or accepting a bill of exchange in the firm name, and this for the reason that the dissolution of the partnership operates as a revocation of all authority for making new contracts. *Bank of Montreal v. Page*, 98 Ill. 109. If one of two joint debtors, however, without other authority than that arising from their being such, could make new contracts binding on all, then the dissolution could make no difference, for they are, at least, still joint debtors as to the firm debts, after dissolution.

In *Helm v. Cantrell*, 59 Ill. 524, it was held that a promissory note given by one partner, after the dissolution of the firm, for a firm debt which had been barred by limitation, did not revive the debt as to the other members of the firm. This would seem to be conclusive against the power of one joint debtor, by contract, express or implied, to revive the debt as to his co-debtor, for there is no reason for pretending that the form in which the debt is revived can make any difference. The note is not binding, for the reason that there is no power to contract to revive the debt, and not because there is no power to execute a promissory note, simply.

The only theory upon which the present case can be maintained is, each joint debtor owes the duty of satisfying or liquidating the debt. Payment by one is payment for all, because it satisfies or liquidates, *pro tanto*, the debt, and therefore from the mere fact

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that so much of the debt is liquidated, the law steps in and implies a contract binding upon all, as well upon those who know nothing in regard to the payment, and have done nothing to cause it to be made, and can therefore have had no intention or volition in the matter, as upon those who made the payment and who did have intention and volition in regard to it, — in other words, because the debt has been partially liquidated or discharged, the law charges and binds all the original debtors, without regard to their actual knowledge of or participation in the act causing the partial liquidation or discharge, as having at that date, for a sufficient consideration, each promised anew to pay the debt, and in this view it would manifestly be unimportant whether such partial liquidation or discharge should be by reason of a direct payment upon the specific debt, or by reason of a payment on general account.

But as we have seen in *Lowery v. Gear, supra*, the doctrine of this court is, a party, to be bound to a new promise by the fact of payment, must have had an affirmative intention in making the payment, and so, whatever may be the legal inference as against the party who actually made the payment, it is impossible that a promise to pay the residue of the debt can be implied from the ignorance and want of intention of the party who neither made nor knew of the payment, nor had any sort of volition in the matter.

Whitcomb v. Whiting has been approved and followed by the courts of Massachusetts, Connecticut, Vermont, Virginia, North Carolina, Maine, New Jersey, Rhode Island, Delaware, and it may be, of some other States, but in the main without giving any reasons therefor other than that of *stare decisis*. It has been repudiated and overruled in Pennsylvania, New York, New Hampshire, Indiana, Ohio, Kentucky, Tennessee, Alabama, Kansas, Nebraska and Florida, and also by the Supreme Court of the United States. And it seems in Maryland, Georgia, Arkansas, and North and South Carolina, an intermediate view prevails, under which it is held an acknowledgment by one of several joint contractors will suspend the running of the statute as against the rest, but cannot revive their liability after it has once been extinguished.

In *Bell v. Morrison*, 1 Pet. 351, the question was, whether, as to a debt of a firm barred by statute of limitations, the promise of a partner after dissolution could remove the bar as to the other partners. The case arose under the limitation law of Kentucky, and was decided at the January term, 1828, of the Supreme Court of

the United States. After quoting the opinion in *Whitcomb v. Whit-
ing*, Mr. Justice STORY, who delivered the opinion of the court said :
“ This is the whole reasoning reported in the case, and is certainly
not very satisfactory. It assumes that one party who has authority
to discharge, has necessarily also authority to charge the others, —
that a virtual agency exists in each joint debtor to pay for the whole,
and that a virtual agency exists, by analogy, to charge the whole.
Now this very position constitutes the matter in controversy. It
is true that a payment by one does inure for the benefit of the whole ;
but this arises not so much from any virtual agency for the whole,
as by operation of law, for the payment extinguishes the debt. If
such payment were made after a positive refusal or prohibition of
the other joint debtors, it would still operate as an extinguishment
of the debt, and the creditor could no longer sue them. In truth,
he who pays a joint debt pays to discharge himself, and so far from
binding the others conclusively by his act, as virtually theirs also,
he cannot recover over against them in contribution, without such
payment has been rightfully made, and ought to charge them.
When the statute has run against a joint debt, the reasonable pre-
sumption is that it is no longer a subsisting debt, and therefore
there is no ground on which to raise a virtual agency to pay that
which is not admitted to exist. But if this were not so, still there
is a great difference between creating a virtual agency which is for
the benefit of all, and one which is erroneous and prejudicial to all.
The one is not a natural or necessary consequence from the other.
A person may well authorize a payment of a debt for which he is
now liable, and yet refuse to authorize a charge where there at
present exists no legal liability to pay. Yet if the principle of Lord
MANSFIELD be correct, the acknowledgment of one joint debtor will
bind all the rest, even though they should have utterly denied the
debt at the time when such acknowledgment was made.”

Again he says: “ We think the proper resolution of this point
depends upon another, that is whether the acknowledgment or
promise is to be deemed a mere continuation of the original promise,
or a new contract springing out of and supported by the original
consideration. We think it is the latter on both principle and au-
thority; and if so, as after the dissolution no one partner can create
a new contract binding upon the others, his acknowledgment is in-
operative and void as to them. * * * The revival of a debt
supposes that it has been once extinct and gone; that there has been

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a period in which it has lost its legal use and validity. The act which revives it is what essentially constitutes its new being, and is inseparable from it. It stands not by its original force, but by the new promise, which imparts validity to it. Proof of the latter is indispensable to raise the assumpsit on which the action can be maintained. It was this view of the matter which first created the doubt whether it was not necessary that a new consideration should be proved to support the promise since the old consideration was gone. That doubt has been overcome, and it is now held that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts it off as a support for the old. What indeed would seem to be decisive on this subject is that the new promise if qualified or conditional restrains the rights of the party to its own terms, and if he cannot recover by those terms he cannot recover at all. If a person promise to pay upon condition that the others do an act, performance must be shown before any title accrues."

And again he says: "The light in which we are disposed to consider this question is that after a dissolution of a partnership no partner can create a cause of action against the other partners except by a new authority communicated to them for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action, whether it be a supposed preexisting debt of the partnership, or any auxiliary consideration which might prove beneficial to them. Unless adopted by them they are not bound by it. When the statute of limitations has once run against a debt the cause of action against the partnership is gone. The acknowledgment if it is to operate at all is to create a new cause of action; to revive a debt which is extinct; and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then in its essence, the creation of a new right, and not the enforcement of an old one. We think that the power to create such a right does not exist, after a dissolution of the partnership, in any partner."

We have quoted thus at length from this case because it may be regarded as the leading case in opposition to *Whitcomb v. Whiting*, and because also we believe the opinion to contain a forcible and accurate view of the law.

The effect of this case as an authority is sought to be somewhat

impaired by the statement that it arose upon the statute of Kentucky, and was decided as it was because of the authority of the decisions of the Kentucky courts. So far as the opinion purports to be governed by the expositions of the law by the Kentucky courts, it has been referred to by this court approvingly in *Keener v. Crull*, *Carroll v. Forsyth*, and *Norton v. Colby*, *supra*.

So far as affects the present question, Mr. Justice STORY in the opinion says: "The Kentucky decisions present no authority directly in point," and he proceeds to reason the question out on principle.

In *United States v. Wilder*, 13 Wall. 254, it was held that when a debtor admits a certain sum to be due by him, and denies that a larger sum claimed is due, a payment of the exact amount admitted cannot be converted by the creditor into a payment on account of the larger sum denied, so as to take the claim for such larger sum out of the statute.

In *Exeter Bank v. Sullivan*, 6 N. H. 136, decided at the March term, 1833, a like view of the law as that of *Bell v. Morrison* was announced by the Supreme Court of New Hampshire. In that case, RICHARDSON, J., in delivering the opinion of the court, said: "If one joint debtor admits that he owes the debt, and says nothing to the contrary, it may be inferred from his silence that he is willing to pay; but his silence can furnish no ground to presume that another who is absent is willing to pay." This was followed, in the same State, by *Kelly v. Sanborn*, 9 N. H. 46, and *Whipple v. Stevens*, 2 Fost. 219.

The Supreme Court of Pennsylvania, in *Levy v. Cadet*, 17 S. & R. 126 (17 Am. Dec. 650), decided at the December term, 1827, held that payment on account, or an acknowledgment, by one of two or more joint debtors, will not take the case out of the statute as to the others, and this has been followed in the same State, by *Coleman v. Forbes*, 10 Harris (22 Penn. St.), 156; *Searight v. Craighead*, 1 Penn. (Penrose & Watts) 135; *Houser v. Irvine*, 3 W. & S. 345; *Schoneman v. Fegley*, 7 Barr. 433, and *Bush v. Stowell*, 71 Penn. St. 208; s. c., 10 Am. Rep. 694.

The Supreme Court of Indiana, in *Yandes v. Lefavour*, 2 Blackf. 371 (decided at their December term, 1830), following *Bell v. Morrison*, held that an acknowledgment of a debt made by one partner, after the dissolution of the partnership, is not sufficient to take a case out of the statute of limitations as to the others.

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It is claimed however that this case is overruled by *Dickerson v. Turner*, 12 Ind. 223. This is a misapprehension. In that case the court follow *Whitcomb v. Whiting* only to the extent that an admission by one of two joint debtors is an admission by all, but say: "The doctrine of *Whitcomb v. Whiting*, so far as it holds an admission by one to be sufficient to take a case out of the statute of limitations, has been controverted in this country, and it has been overruled by the Supreme Court of the United States, by the Court of Appeals of New York, and by the Supreme Court of this State at an early day," and then, after referring to the cases, it is added: "The modern and more correct doctrine is, that it is the new promise, as such, supported by the original consideration, that takes the case out of the statute, and not the new promise, viewed merely as an admission of the debt. * * * Such new contract neither a joint contractor nor a partner, after the dissolution, has power to make so as to bind his co-contractor or copartner."

By the Revised Code of Alabama, section 2914, it is enacted that "no act, or promise, or acknowledgment is sufficient to remove the bar to a suit, or is evidence of a new and continuing contract, except the partial payment made upon the contract by the party sought to be charged, before the bar is complete, or an unconditional promise in writing, signed by the party to be charged thereby."

We do not think, so far as the effect of a partial payment is concerned, this statute differs essentially from a proper construction of ours. Ours, it is true, does not say that the partial payment must be made by the party sought to be charged, but this very clearly is its effect. A stranger — one owing no duty to pay — certainly cannot make a payment. It can only be by one owing a duty to pay. Indeed, the whole contention on the part of the plaintiff here concedes this. He contends Dickinson is bound, not because payment can be made by anybody which would be binding upon him, but because, in legal effect, payment by his principal is payment by himself, and this being so, a new promise by Dickinson is to be inferred as a matter of law.

The Supreme Court of Alabama, in *Lowther v. Chappell*, 8 Ala. 353, held under this section, "a payment by one of several joint debtors before the statute has completed a bar will not prevent the completion of the bar as to the others at the expiration of the time within which the statute required suit to be brought on the original evidence of debt, relied on to sustain the action." This was fol-

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lowed in the same court in *Myatts v. Bell*, 41 id. 222; *Knight v. Clements*, 45 id. 89; s. c., 6 Am. Rep. 693.

In *Belote's Exrs. v. Wynne*, 7 Yerg. 534, decided at the March term, 1835, the Supreme Court of Tennessee followed the doctrine of *Bell v. Morrison*, and this has since been followed by *Muse v. Donalson*, 2 Humph. 166.

In *Palmer v. Dodge*, 4 Ohio St. 21, the same result was reached by the Supreme Court of Ohio.

More recently, in Kansas, Nebraska and Florida, the doctrine of *Whitcomb v. Whiting* is repudiated, and that of *Bell v. Morrison* followed. *Steele v. Soule*, 20 Kans. 39; *Mayberry v. Willoughby*, 5 Neb. 368; s. c., 25 Am. Rep. 491; *Tate v. Clements*, 16 Fla. 339; s. c., 26 Am. Rep. 709. Like reasoning will also be found in *Stelle v. Jennings*, 1 McMullen, (S. C.), 297; *Foute v. Bacon*, 24 Miss. 156; *Briscoe v. Anketell*, 28 id. 361.

The earlier decisions in New York followed *Whitcomb v. Whiting*. See *Johnson v. Beardslee*, 15 Johns. 3; *Patterson v. Choate*, 7 Wend. 441. But in 1849 the Court of Appeals of that State, in *Van Keuren v. Parmelee*, 2 N. Y. 523, overruled these cases after an able review of the authorities, and held that the presumed agency of a partner ceases with the dissolution of the firm, and that after dissolution an acknowledgment or promise to pay by one of the partners will not revive a debt against the firm which is barred by the statute of limitations. In the opinion, which was by BRONSON, J., it is among other things said, after quoting the opinion in *Whitcomb v. Whiting*: "Nothing but the great name of Lord MANSFIELD could have given currency to this reasoning. It is plain enough that 'payment by one is payment for all,' so far as relates to the satisfaction of the debt; but that fact neither shows, nor has it any tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due, and like any other admission it can only affect the party who makes it, unless he has authority to speak for others as well as himself. A joint debtor has no such authority. It cannot be justly inferred from the relation which he sustains to the other joint debtors; and though he may conclude himself by an admission he cannot conclude them. His lordship, after saying that 'payment by one is payment for all,' adds, 'the one acting virtually as agent for the rest.' If the meaning be that there is such an agency as will make the payment by one inure to the benefit

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of all the other joint debtors the reasoning is well enough, but it proves nothing on the point in controversy. If the meaning be that one joint debtor is the agent of the others for the purpose of making admissions to bind them, that was assuming the very point to be proved, and the assumption had neither authority nor argument to support it. There is nothing in the relation of joint debtors from which such an agency can be inferred. A joint obligation is the only one which links them together, and from the nature of the case payment of the debt is the only thing which one has authority to do for all."

This case was followed by *Shoemaker v. Benedict*, 1 Kern. 176, in which it was held payments made by one of the joint and several makers of a note and indorsed upon it, before an action upon it is barred by the statute of limitations, and within six years before suit brought, do not affect the defense of the statute as to the others. And still more recently in *Winchell v. Hicks*, 18 N. Y. 558, the same doctrine is reasserted and enforced.

Chancellor KENT, in the third volume of his Commentaries, 8th ed. 55, after alluding to the doctrine of *Whitcomb v. Whiting*, says: "Of late however the decision in *Whitcomb v. Whiting* has been very much questioned in England, and it seems now to be considered an unsound authority by the court which originally pronounced it. And we have high authority in this country for the conclusion that the acknowledgment by a partner, after the dissolution of the partnership, of a debt barred by the statute of limitations, will be of no avail against the statute, so as take the debt out of it as to the other partner, on the ground that the power to create a new right against the partnership does not exist in any partner after the dissolution of it; and the acknowledgment of a debt barred by the statute of limitations is not the mere continuance of the original promise, but a new contract, springing out of and supported by the original consideration." What he says about the authority of *Whitcomb v. Whiting* in England is perhaps stronger than decisions made subsequent to the time he wrote will justify, but in all other respects, we apprehend, he is correct.

Story, in his work on Partnership, § 324, speaking of this question, says: "In some of the States the English doctrine has been approved; in others it has been silently acquiesced in, or left doubtful; and in a considerable number it has been expressly overruled. The Supreme Court of the United States have not hesitated, after

a most elaborate discussion, to overrule it, as unfounded in principle and analogy. In truth, the whole controversy must ultimately turn upon the single point whether the acknowledgment is a mere continuation of the original promise, or whether it is a new contract or promise springing out of and supported by the original consideration. It is upon the latter ground that the Supreme Court have deemed the doctrine wholly untenable."

The learned editors of Smith's Leading Cases say that the rule under which an acknowledgment by one co-contractor will not take the debt out of the statute as against another, without some power other than that arising from the joint nature of the obligation, is the more logical one. Notes to *Whitcomb v. Whiting*, vol. 1, part 2 (7th Am. ed.), p. 982.

Proffatt, in his notes to *Beitz v. Fuller*, 10 Am. Dec. 697, says: "It must be confessed that the later and better decisions show a strong preference for the rule, that except in cases of a subsisting partnership one joint debtor shall not have the power to deprive his co-debtors of the statute by his own promise or admission without their consent, and that in States where the contrary doctrine is established it seems to rest upon the principle of *stare decisis*, rather than upon sound reason."

The point is made in argument that payment before the bar is complete and payment afterward rest upon different principles, and therefore although on the authority of *Bell v. Morrison* one joint contractor cannot bind another by a payment after the bar is complete, he may do so by a payment before. It is true, in *Bell v. Morrison*, and in *Van Keuren v. Parmelee*, some stress is laid upon the fact that the debt is barred, and has therefore ceased to be obligatory, etc., but in principle it can make no difference. In either case, if the running of the statute is arrested, it is because of the new promise, express or implied; and it is that new promise, *i. e.*, contract, — resting upon the consideration of the old debt, in either case, where the statute is pleaded, that is replied to take the case out of the statute. The same elements of contract must exist in either case.

This was the ruling in *Shoemaker v. Benedict*, *supra*, and in other cases to which it is unnecessary to refer. In that case, the judge pronouncing the opinion, among other things, said: "And in principle, I see not why a promise made before the statute has attached to a debt should be obligatory when made by one of several

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joint debtors, when it would not be obligatory if made after the action was barred. The statute operates upon the remedy. The debt always exists. * * * The same authority is required to make the promise before as after the six years have elapsed. Can it be said that one of several debtors can, on the last day of the sixth year, by a payment small or large, or by a new promise, either express or implied, so affect the rights of his co-debtors as to continue their liability for another space of six years without their knowledge or assent, or any authority from them, save that to be implied from the fact that they are at the time jointly liable upon the same original contract, and yet that on the very next day, without any act of the parties, such authority ceases to exist?"

Surely, the question can admit of but one answer.

Perceiving no error in the ruling of the Appellate Court, its judgment is affirmed.

Judgment affirmed.

SHARP V. THOMPSON.

(100 Ill. 447.)

Deed—false description.

A mortgage described several lots by numbers, adding, "being all of block 25," etc. It appeared that this block contained no such numbers, but they were in another block, and also that the mortgagor's intention was to mortgage the block in which he lived, and that he lived in block 25. *Held*, effectual to convey block 25.*

MORTGAGE for foreclosure. The opinion states the case. The plaintiff had judgment below.

Buxton & White, for plaintiff in error.

Murray & Andrews, for defendant in error.

SHELDON, J. This is a writ of error brought to reverse a decree of foreclosure of a mortgage. The mortgage purports to convey a homestead, and to have been acknowledged before the deputy clerk of the Circuit Court of Clinton county.

[Minor point omitted.]

*To same effect, *Moreland v. Brady* (8 Oreg. 308), 34 Am. Rep. 581.

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The mortgage purported to convey, among other property, also lots 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30, being all of block 25, in Lower Carlyle. These numbered lots are not in block 25, and it is contended by plaintiff in error that it is these numbered lots which are conveyed by the mortgage, and not block 25. The evidence shows that the blocks in Lower Carlyle are consecutively numbered from one to thirty, and contain ten lots each, the lots in all the blocks being consecutively numbered from one to three hundred. Lots 21 to 30 inclusive are in block 3. The lots in block 25 are numbered consecutively from 221 to 230.

It appears that the arrangement before the mortgage was made was that the mortgagor should give a mortgage on a house and certain lots in the town of Carlyle, being his residence in which he lived at the time, and that he was living at the time on block 25, in Lower Carlyle, and had lived there for more than ten years previous. There is evidently a false particular of description here, in either the lots or block, and which description shall prevail, that of the lots or of the block? It is from intrinsic evidence that the ambiguity appears, and that same kind of evidence shows clearly enough that the description of the block was the description which was intended, and such evidence is admissible to explain a latent ambiguity.

It is a rule of construction that where there is a doubt as to the construction of a deed, it shall be taken most favorably for the grantee. Whence, if there are two descriptions in the deed of the land conveyed and they do not coincide, the grantee is at liberty to elect that which is most favorable to him. *Melvin v. Props. Locks, etc.*, 5 Metc. 27; 3 Wash. on Real Prop. 628-9, marg.; *Esty v. Baker*, 50 Me. 331.

It is a maxim that *falsa demonstratio non nocet*. The description here by the block alone is full and sufficient to ascertain the estate, and it no doubt describing what was intended to be conveyed, that description, we are of opinion, should prevail, and the description by the lots be rejected as a false particular of description. This will not, as supposed by counsel for defendant in error, amount to the reformation of the deed of a married woman, which this court has decided could not be made under our former law, but it is only determining which one of two inconsistent descriptions shall prevail.

[Minor matter omitted.]

Decree affirmed.

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PEOPLE EX REL. V. JOHNSON.

(100 Ill. 537.)

Municipal corporation — liability on order for money — mandamus.

Mandamus is not the proper remedy in case of a doubtful right.

A county issued an order on its treasurer for the payment of money. The payee indorsed it in blank and lost it. The relator in good faith purchased it. The county issued a duplicate order to payee, and the treasurer paid it. *Held*, that the relator could not recover in any form of action against the county.

MANDAMUS. The opinion states the case. The relator had judgment, which was reversed by the Appellate Court.

H. B. Hurd, for appellant.

Consider H. Willett, for appellee.

MULKEY, J. This is an appeal by the people, on the relation of Harvey B. Hurd, from a judgment of the Appellate Court for the first district, reversing a judgment of the Circuit Court of Cook county, awarding a peremptory *mandamus* commanding the county treasurer of Cook county to pay to the relator, Harvey B. Hurd, \$250, the amount of a county order issued by Cook county to John Comiskey, on account of his services as clerk of the county board.

The order was in the usual form, bearing date June 1, 1877, signed by the county clerk, and countersigned and registered by the treasurer. On the day of its issue, Comiskey, the payee, indorsed it in blank, and while on his way to the treasurer's office to obtain payment, casually lost it, and it subsequently came into the hands of the relator in the regular course of business, he having purchased the same in good faith at its full market value, without any notice of the defective title. On the 25th of the same month, on proof of the loss of the order by Comiskey, a duplicate order was issued to him by order of the county board, which was paid by the county treasurer in August following, and before the commencement of the present proceeding, the county neither taking nor requiring any indemnity from Comiskey on account of the lost order.

Two questions are presented for our determination by the foregoing state of facts :

First — Assuming the county is liable to the relator in some form of action, is *mandamus* the proper remedy ?

Second — Is the county, under the facts stated, liable to the relator in any form of action ?

In the view we have taken of this case, both these questions must be answered in the negative.

It is to be remarked, in the first place, that all the duties of a statutory disbursing officer, such as county treasurer, are generally, if not universally, specifically defined by statute, so that ordinarily, where no discretion is given him in the discharge of those duties, there can be no just ground for controversy as to when he will be bound to honor orders drawn on him, and when he will not. Hence, as a general rule, *mandamus* will lie to compel a county treasurer, or other disbursing officer, to pay an order legally drawn upon funds in his hands, subject to the payment of such order. Nor would the rule, in this respect, be changed by reason of the officer having, through inadvertence or misapprehension of duty, made payment to another who had no claim upon, or pretense of right to, the fund thus paid out. *The People ex rel. v. Smith and Miner*, 43 Ill. 219. But where, in such case, by reason of a complication of extraneous circumstances not specifically provided for by the statute, a well-founded doubt arises, either as to the right of the applicant to receive the fund, or the duty of the officer to pay it out, *mandamus* is not the proper remedy. The right in such case being doubtful, the claimant must resort to some other appropriate remedy to determine it. *People ex rel. v. Dulaney*, 96 id. 503 ; *People ex rel. v. Klokke*, 92 id. 134.

While the remedy by *mandamus* rests largely in the discretion of the courts, yet the rule is uniform and inflexible that the writ will not be granted unless the relator's right to it is clearly established. *People v. Davis*, 93 Ill. 133.

It is difficult to perceive upon what theory it can be seriously contended that the relator has shown a clear right to the writ in this case. The county was indebted to Comiskey, on account of his services as clerk, in the sum of \$250. The drawing of the order on the county treasurer for that sum did not operate as a payment, or change the character of the indebtedness. The order was given simply because it was an essential part of the plan or system

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which the law has provided for the disbursement of the county funds and the payment of its indebtedness. By means of these orders any discrepancies between the allowances made by the county board and the account of the treasurer can be easily detected. They serve as vouchers in the hands of the treasurer, and this was doubtless the primary object of the legislature in requiring them to be issued. This being so, the mere loss of the order in question, although indorsed in blank, could not have affected the right of Comiskey to payment for his services. It was therefore entirely proper for the county board to order the county clerk to issue a duplicate order for the amount, so as to provide the treasurer with the appropriate voucher on payment. This was done. The debt having been paid upon the surrender of the duplicate order, the original order became inoperative and void.

It is claimed however that the order in question is to be regarded as negotiable paper, and that the relator having purchased it at its full market value, in the regular course of business, without notice of any infirmity in it, the county is bound to protect him by paying the amount of the order again; and this brings us to the second question presented for our determination, namely: Is the county liable, under the facts of this case, in any form of action?

If any one proposition can be regarded as clearly and definitely settled beyond all question it is that the officers or official agents of a county or other municipal corporation have no power, without express legislation for that purpose, to issue commercial paper, and thereby impose upon the municipality the duties and liabilities incident to such paper. And we think it equally clear, as shown by the whole course of decisions in this State, that the statute authorizing the issuing of county orders was not intended to, nor does it confer any such power, nor do those orders when issued possess the essential qualities and attributes of commercial paper. As soon as countersigned and registered by the treasurer they are at once due, without presentment for or demand of payment, and hence, whether assignable or not, they are always open to any defense which would be available if the suit were brought in the name of the original payee. Indeed, it is admitted by counsel in this case that the true state of the account between the payee of the order and the county may always be shown by way of defense, even as against an innocent holder. This is in effect conceding they are not commercial paper, for if commercial paper, such a defense would not be available as

against an innocent holder. In all cases the county has to deal with the indebtedness which the order represents, and it cannot be made liable twice on account of the same indebtedness. Should the officer pay the claim to an unauthorized person not in possession of the order, it would not operate as a discharge of the debt, and the officer would be personally liable for a misappropriation of the fund. The creditor of the county is not to be deprived of his claim because he has accidentally lost the order which represents it, provided he notifies the county of the loss before payment to the holder of the order, who must necessarily derive his title through a polluted source. Where there has been no actual transfer or payment of the indebtedness before the proper authorities of the county are notified of the loss of the order, the creditor will be entitled to payment notwithstanding such loss, and the holder of such lost order will be remediless so far as the county is concerned. His only remedy would be against the party from whom he got it; and there would be no hardship in this, since every one purchasing such paper is conclusively presumed to know that by his purchase he only acquires the rights of his assignor, whatever they may be, and whether there has been a written assignment or a mere transfer by delivery makes no difference in this respect.

We regard the rule well settled, by consideration of public policy as well as by a decided preponderance of authority, that warrants or orders drawn by one municipal officer upon another, in the disbursement of the funds of the municipality and payment of its indebtedness, are not to be regarded as negotiable or commercial paper, cutting off equities against the corporation. As we have already seen, the official agents of these municipalities have no implied power to execute such paper, and to clothe these warrants or orders with the qualities and attributes of commercial securities would be to give them a character foreign to the object and purposes of their creation. *Hewitt v. Normal School District*, 94 Ill. 528.

While these orders if payable at a future day would be in form inland bills of exchange, yet there is in fact a want of the usual parties essential to such paper. In the case of a bill of exchange we have the drawer, payee and drawee, the latter after acceptance being called the acceptor. These parties upon the execution of the paper assume certain specific duties and obligations toward each other. The instrument is a written contract between them. In

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the case of a municipal warrant or order nothing in fact of this kind occurs. The officers signing the paper assume no personal liability upon it. If never paid, the officer drawing it could not successfully be sued upon it, nor could the treasurer be sued for non-payment, except where he refuses after the necessary funds have been provided for that purpose, and then not on the instrument itself. Indeed, neither the clerk nor the treasurer is a party to a county order. The county, in contemplation of law, is both drawer and drawee. That is the county, through its official agent, the clerk, draws an order on itself. No duty or obligation therefore is created between the apparent drawer and drawee upon the making of such an order as is usually created in the case of a bill of exchange, for the drawer and drawee are the same party, and strictly speaking one cannot owe a legal duty to himself. Moreover, this instrument was payable out of a particular fund, namely, such moneys as might happen to be in the treasury not otherwise appropriated, while it is essential to commercial paper that it be payable absolutely and at all events. This of itself shows that such orders or warrants are not to be regarded as commercial paper. These considerations, when taken in connection with the manifest objects and purposes of the legislature in providing for such orders, as heretofore stated, clearly show they were not intended to be included in that class of instruments provided for in chapter 98 of the Revised Statutes, entitled "Negotiable Instruments."

In addition to this it is manifest, from even a cursory examination of that chapter, that many of its provisions are wholly inapplicable to instruments of the character we are considering. The case of *Garvin v. Wiswell*, 83 Ill. 215, is cited as holding a contrary doctrine. The instrument in that case was not, like the one in the present, an ordinary county order, issued under the general law relating to such instruments. On the contrary, it was not only in form a negotiable security, but was intended by the county authorities at the time of its issue to be put upon the market and sold as such. And while there was no authority to issue it at the time it was done, yet a few days afterward the legislature passed a special act ratifying the action of the board of supervisors in issuing it and others of a similar character, whereby the same were rendered valid and binding on the county. (Vol. 1, Pr. 1865.) The effect of this act was equivalent to a previous authority to issue the instrument, and gave to it, as was originally intended, all the attributes of com-

mercial paper. That the legislature has ample power to authorize counties or other municipalities to issue negotiable securities is not to be questioned, yet without such special legislative authority they have no power to do so, and there is no pretense that the order in this case was issued for any such purpose, or was authorized by any special act of the legislature.

Nevertheless, in many of the States, including our own, it has become quite common in business transactions to transfer these instruments by written indorsements, in the same manner as if commercial paper, and this usage or custom prevails to such an extent that many courts of the highest respectability have recognized the validity of such assignments, for the purpose simply of enabling the assignee to sue in his own name, saving to the municipality all equities and defenses which would be available if the suit were brought in the name of the original payee.

We perceive no substantial objections to this doctrine, and it is believed that public convenience will be promoted by its recognition. Indeed, the principle has already been recognized by previous decisions of this court. *Newell v. School Directors*, 68 Ill. 514; *Turner P. and S. R. R. Co.*, 95 id. 134; s. c., 35 Am. Rep. 144.

The foregoing general views are believed to be fully sustained by the following authorities: 1 Dan. Neg. Inst., § 427; Dill. Mun. Corp., § 406 (1st ed.); *Mayor v. Ray*, 10 Wall. 468; *Dana v. San Francisco*, 19 Cal. 491; *People v. Eldorado County*, 11 id. 175; *Clark v. Polk County*, 19 Iowa, 248; *Clark v. City of Des Moines*, id. 199; *Hyde v. Franklin County*, 27 Vt. 185.

It follows from what we have already said that an action for the amount of the order in question could not, after payment to Comiskey, have been maintained in his name against the county, either for his own use or that of the relator, and hence the county, under the facts of this case, is not, as we have already stated, liable to the relator in any form of action.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

WALKER, J., dissenting.

Payne v. Newcomb.

PAYNE V. NEWCOMB.

(100 Ill. 611.)

Usury — by agent.

A loan made through the lender's agent, the lender understanding that the agent is to charge the borrower for the agent's services in procuring the loan, in addition to lawful interest, and the agent receiving pay therefor accordingly, is usurious.*

BILL for injunction and account. The opinion states the case. The defendant had judgment below.

E. F. Bull and *L. G. Pearre*, for plaintiff in error

Charles H. Wood, for defendant in error.

WALKER, J. Complainant Mary M. Payne was the owner of about 400 acres of land in Livingston county, and in July, 1867, she and her husband wishing to procure a loan of \$2,000, applied to Newcomb, a loan agent in Chicago. He loaned them the money, took their note, payable to Herrick Stevens in two years, with ten per cent interest, semi-annually. To secure the loan they executed a trust deed for the land to Pierce, with the usual power of sale. Complainants subsequently procured other loans from Newcomb, and gave similar notes and trust deeds on the land. When each loan was made, Newcomb deducted from the amount five per cent, which he claimed as a commission for procuring the loan. There were several extensions of the time for payment, and when they were made he charged two and a half per cent, as he claims, for procuring them. When interest was not promptly paid it was compounded at the rate that the notes bore. Complainants claim to have borrowed no more than \$6,630, and Payne so testifies, and to have paid in all \$5,800, and yet Newcomb, on the 1st of November, 1877, furnished a statement in which he claimed there was still due \$11,967.17. It is claimed that Newcomb, in making these loans, was Stevens' regular agent; that being such, he made the loans and retained the commissions with the knowledge and approval of Stevens.

* See *Brigham v. Myers* (51 Iowa, 397), 33 Am Rep. 140.

The bill was filed to enjoin a sale of the land under the power in the trust deeds, and for an account to ascertain what is equitably due after deducting usury and illegal charges. On a hearing the court dismissed the bill, and complainants appealed to the Appellate Court for the second district, where the decree was affirmed. They thereupon bring the record to this court on error, and urge a reversal.

[Omitting statement of testimony.]

From all of this testimony we are compelled to believe that Newcomb was the agent of Stevens from the time the application was made for the loan. The whole transaction is not susceptible of any other construction. It is apparent that Stevens regarded and relied on Newcomb as his agent, and would have held him liable for loss growing out of neglect of duty. Newcomb testifies that Stevens would have held him liable for a mistake in examining the title. If so, then he was Stevens' agent as well before as after the loans were made, and no such distinction can be reasonably drawn as that Newcomb was Payne's agent before and Stevens' after the loans were made.

Did Stevens know that Newcomb was charging for his services, and collecting it from the borrower? Newcomb says that it was the understanding he was to get it of the borrower, and that establishes the fact beyond all cavil. Were these payments of commissions of benefit or profit to Stevens? They unquestionably were, as they paid his agent for long continued and valuable services rendered by Newcomb for him. No one will believe that Newcomb thus incurred liability to Stevens, and rendered skillful and valuable services for him more than twenty years, as a mere gratuity. It was not so understood. Newcomb says he was to get his pay from the borrower. Stevens then paid what he owed to Newcomb by requiring the agent to impose it on the person to whom loans were made. The arrangement amounted to no more or less than requiring the agent to loan for a per cent sufficiently high to yield Stevens the highest rate of interest allowed by the law and to pay the agent for his responsibility, labor, skill and trouble. In effect the transaction is the same as had the loan been made at fifteen per cent, and ten had been paid to Stevens and five to Newcomb. This was the result which was by the parties intended before the inception of the transaction. It was in pursuance of an arrangement of the lender and his agent.

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Again, we are strongly impressed that there is included a large amount of usurious interest in the claim of the balance due on these loans, as well as compound interest. The statement rendered by Newcomb contains a charge of \$319.19 for interest on interest, and another charge for his commissions of \$545.50, and from the amount he states was loaned and admits was paid we must suppose a large amount of commissions had been paid, also interest on interest. When over \$12,000 was claimed to be due when Newcomb testified, it must be that there had been deducted from payments made a large sum for such items, or from some other illegal charge. We are of opinion that the evidence shows that the amount claimed contains usurious charges, and that usury has been charged and retained.

It is however claimed that Stevens is not liable for what Newcomb retained and charged for what is called commissions; that he had the right to charge any sum he chose, and that would not render the loan usurious. Had Stevens not known that Newcomb was making such charges it may be that he would not have been affected by them. But here it was agreed between Stevens and Newcomb that the latter should charge a commission of the borrower to pay him for his services. Stevens obtained the services of Newcomb. They were of value to him, and no one will pretend that Newcomb rendered them as a gratuity. They were rendered for Stevens, and they were paid for by him by indirectly charging the amount to and requiring the borrower to pay it, and this too by the express authority of Stevens. Had he directed Newcomb to loan at fifteen per cent for the first year and ten per cent for each succeeding year, and to retain five per cent on the loan for the first year, and two and a half per cent for renewals and extensions, and to retain the extra per cent above ten per cent as compensation for his services, would any one say that was not usury? And in what does the transaction differ by the form given it by the agreement of the parties? In each case Stevens would get Newcomb's services and compel the borrower to pay for them.

There is no more familiar rule in the law than that the usury laws cannot be evaded by mere pretenses, shifts or evasions. This rule runs through all of the books, and requires the citation of no authority in its support. The policy of the statute is to protect the weak and necessitous from the oppression of the strong, and to sanction such transactions as this would be to defeat that policy.

Courts have no right to judge of the policy, but must enforce the law as they find it. Whenever deemed proper the general assembly will change the policy by modifying or repealing the statute, but until so modified or repealed we have no power to alter or change its provisions.

The Supreme Court of Nebraska say it is a well-settled rule of law that will not be questioned, "that in all cases where a person employs another as his agent to loan money for him and places the funds in the hands of the agent for such purpose, the principal is bound by the act of his agent; and if the agent charges the borrower of such money unlawful interest, or even demands and receives from the borrower a bonus for such loan, and appropriates it to his own individual use, either with or without the knowledge of the principal, the principal is affected by the act of the agent. In contemplation of law the acts of the agent are the acts of the principal, because the nature of the business which he has placed in charge of his agent furnishes the means of violating the law. In such business transactions by agency there can not be an agreement between the lender, through the agent, and the borrower, and a separate, distinct contract between the agent and borrower, because it is in consideration of the loan that the unlawful interest or bonus is paid, and hence the whole transaction must be a single indivisible proposition,—it is one contract only." *Philo v. Butterfield*, 3 Neb. 256. And to the same effect are the cases of *Cheney v. White*, 5 Neb. 261; s. c., 25 Am. Rep. 487, and *Cheney v. Woodruff*, 6 Neb. 151. In this last case, where the agent received from the borrower a note and mortgage for the bonus or commission for making the loan, it was held that it tainted the loan with the vice of usury.

The Court of Appeals in New York, by a divided court, lay down as a rule in such cases, that a bonus received by the agent above the legal rate of interest, without the knowledge, consent or sanction of the principal, and under circumstances where no such knowledge, sanction or consent can be reasonably inferred, will not render the contract usurious. *Condit v. Baldwin*, 21 N. Y. 219. the question was again before the court in *Bell v. Day*, 32 id. 165, and the rule was sanctioned by a divided court, and partly on the rule of *stare decisis*. A majority were against the rule, but two of the judges felt bound by the case of *Condit v. Baldwin*, *supra*, otherwise the fact the agent received the bonus or commis-

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sion would have been held to taint the transaction with usury even without the knowledge or assent of the lender, as was held by the Nebraska court.

This is, we believe, as far as any court has gone in that direction. And Tyler, in his work on Usury, p. 170, says that the question may be regarded as settled in that court; but from the strong and able and well fortified opinions of the dissenting judges it is doubtful whether the rule will be readily assented to by the courts of other States. That author lays down the rule, at page 156, that "if the agent, in good faith, makes the loan for another, and exacts a bonus besides the legal interest, for his own benefit, without the authority or knowledge of the principal, the loan is not thereby rendered usurious."

In *Rogers v. Buckingham*, 33 Conn. 81, it is said: "This would have been unquestionably a usurious loan if made by David Bulkley. It was in fact made by his son, as his agent. The question in the case is therefore one of authority. If the loan as made was authorized originally by David Bulkley, or was subsequently and intelligently ratified by him, it was usurious; but if the additional sum of ten dollars was exacted by and paid to the agent for the use and benefit of the agent only, without prior authority from the principal or subsequent knowledge and ratification by him, it was not usurious. It is not found as a fact that the agent was authorized to take the usurious excess. Such authority will not be presumed when the agency is special, and limited to a single transaction. It may be presumed when the agency is general, and embraces the business of making, managing and collecting the loans of a moneyed man; and the facts found show such an agency in this case. But it is a presumption of fact and may be rebutted, and whether it was or not in this case, it was the duty of the auditor to determine. * * * And we think that the peculiar and distinct manner in which the ten dollars excess was agreed to be paid, in connection with the other facts found, would have justified the auditor in finding that it was an unauthorized exaction by the agent for his compensation, and must have been so understood by the borrower."

These cases all recognize the rule that if the bonus or commission is taken by the agent with the consent, or by authority, or with the knowledge of the principal, or if, without his knowledge, authority or consent, he afterward ratifies the act of the agent,

knowing the facts, the loan must be treated as tainted with usury. The rule is reasonable, and tends to prevent the evasion of the provisions of the law. It is true the rule of the Nebraska court is broader, but embraces the rule of the other courts.

In the case of *Muir v. Newark Savings Inst.*, 1 Green (N. J.), 537, it was held, that if an agent in making a loan accepts from the borrower a bonus above the legal rate of interest, it will not render the transaction usurious unless the fact was known to the lender, or he received the benefit of the bonus. Neither knowledge by nor profit to the lender was proved, and hence the case was held not to fall within the rule.

We are referred to the case of *Ballinger v. Bourland*, 87 Ill. 513; s. c., 29 Am. Rep. 69, as announcing a different rule. This is a misapprehension of the scope of the decision. In that case, Bourland lived in Peoria, and he, as the agent of Ballinger, procured a loan of \$17,000 for him, and charged Ballinger a commission of five per cent on that sum for procuring the loan, and \$100 for going to Chicago and obtaining a release of the premises from a mortgage on them of \$16,000, which charges Ballinger paid to Bourland. The court say: "There appears but the simple transaction itself, without any pretense by the testimony that the insurance company was in any way privy to receiving the money by Bourland, or that the agreement therefor was with the knowledge or authority of the insurance company, or that it derived any benefit therefrom."

In that case the insurance company was the lender and Ballinger the borrower, and nothing appears to show Bourland was the agent of the company. The opinion proceeds on the ground that the insurance company was in no way privy to the payment by Ballinger to Bourland of the commission and the \$100 for his services in obtaining the release of the premises from the mortgage, or that the agreement was with the knowledge or authority of the lender, or that it derived any profit therefrom, thus negatively asserting that had the lender been privy to the agreement or it had been made with the knowledge or authority or to the profit of the lender, the transaction would have been usurious. That case falls far short of justifying the transaction in the case at bar. It may not ann unce the rule as broadly as other courts, but it contains nothing that sanctions the taking of a commission or bonus by the agent with the privity, knowledge or consent of the principal. We are not required to go the length of the Nebraska cases to condemn this transaction

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We are also referred to the case of *Phillips v. Roberts*, 90 Ill. 492, as an authority in favor of defendants in error. In that case Phillips was a loan broker, and as such had loaned to one Benden a sum of money, and charged and received from him \$150 as commissions. Roberts claimed that under an agreement existing between him and Phillips he was entitled to \$50 of the commissions thus received, for having taken Benden to Phillips as a customer. Phillips refused to pay, and Roberts sued him to recover the amount, and it was held he might recover. That case in no wise involved the question under discussion in this case, and consequently is not applicable to its facts. Roberts had contracted with Phillips, and his contract in nowise involved any question of usury between the borrower and lender. Whether there was usury or not, could in nowise affect the contract between Roberts and Phillips.

[Omitting a minor consideration.]

Decree reversed.

CRAIG, C. J., dissenting.

CASES

IN THE

SUPREME COURT

OF

INDIANA.

WILLIAMS V. MORAY.

(74 Ind. 25.)

Animals— injury by — contributory negligence — pleading.

The doctrine of contributory negligence applies to cases of personal injury by vicious animals, and the complaint in such action must aver that the plaintiff was not negligent.*

ACTION for personal injury by the bite of a dog. The opinion states the case. The plaintiff had judgment below.

S. P. Oyler, for appellant.

F. S. Staff and *P. M. Dill*, for appellees.

BEST, C. The appellee John Moray brought this suit against his co-appellee and the appellant. His complaint consisted of two paragraphs. He averred, in substance, in the first, that said James and Thomas Williams wrongfully kept a certain dog, well knowing

* See contra, *Muller v. McKesson* (73 N. Y. 195), 29 Am. Rep. 123.

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that said dog was accustomed to attack and bite mankind; that while they so kept him, said dog did attack and bite the plaintiff, by reason whereof he was greatly injured and damaged in the sum of \$500.

In the second, he in substance averred that said James and Thomas Williams did wrongfully keep, unsecured, a certain ferocious and mischievous dog, and suffered the same to run at large, well knowing said dog's ferocious and mischievous nature, and his propensity to attack and bite mankind; that while said dog was suffered by them to run about, without restraint or confinement, he did, on the street and sidewalk, in the city of Franklin, attack and bite the plaintiff, throwing him down, tearing his clothing, wounding and lacerating one of his legs, with great violence, by reason of which the plaintiff was greatly injured, and sustained damages in the sum of \$500.

The appellant demurred to each paragraph of the complaint, because neither stated facts sufficient to constitute a cause of action. The demurrer was overruled, and he excepted. Both defendants filed an answer in denial. The issue was submitted to a jury, and a verdict returned for the appellee against the appellant, and in favor of the appellee Thomas Williams. The appellant moved for a new trial, which was overruled, and he excepted. A judgment was rendered against him upon the verdict, from which he appeals and assigns, as error, that the court erred in overruling his demurrer to each paragraph of the complaint, and in overruling his motion for a new trial.

In support of the first assignment, it is insisted that the facts averred do not show, nor is there any averment in the complaint, that the appellee was himself without fault, and therefore each paragraph was insufficient on demurrer.

In all actions of negligence this is the rule of pleading. It was so held in the case of *President, etc., v. Dusouchett*, 2 Ind. 586, and the ruling in that case has been uniformly followed since. *Evansville, etc., R. Co. v. Hiatt*, 17 id. 102; *Indianapolis, etc., R. Co. v. Keeley's Adm'r*, 23 id. 133; *Evansville, etc., R. Co. v. Dexter*, 24 id. 411; *Jeffersonville R. Co. v. Hendricks' Adm'r*, 26 id. 228; *Louisville, etc., Ry. Co. v. Boland*, 53 id. 398.

In the case last cited it is said, that in this State it is established by a long line of decisions, that in actions to recover for an injury caused by the negligence of another, the complaint must show that

the party injured was himself guilty of no negligence that contributed to the injury. This is then the settled rule in all cases to which it applies. Does it apply in this case? It does, if the action is based upon the negligence of the appellant.

In Shearman and Redfield on Negligence, it is said: "Sec. 185. The owner of an animal is liable for injuries which by his negligence he suffers it to commit; and except in some cases provided for by statute (which will be hereafter separately considered), he is not liable for the acts of the animal upon any other ground than that of negligence, actual or presumed."

The common law imposes the duty upon the owner of an animal that is naturally inclined to stray and trespass upon the lands of another, to restrain it, and if he does not, negligence is presumed. This duty is not imposed upon the owner of a dog, for the reason that the straying of such an animal upon the lands of another is not liable to cause an injury, but a like duty is imposed upon the owner of a dog to restrain him, if the owner have knowledge that he is vicious, and if he is not restrained, the failure so to do is negligence.

The gist of the action is the failure to keep such animal securely. It is frequently said that the *scienter* is the gist of the action, and it is true that no action can be maintained without it, but it is equally true that no action can be maintained with it alone. No law is violated, nor any liability created by securely keeping a ferocious animal, with knowledge of its vicious disposition, but this knowledge imposes the duty to keep it safely, and the neglect to do this, coupled with an injury, creates the liability. No negligence is imputed without this knowledge, and with it no liability is incurred, without negligence.

If the owner of such animal, after notice of its vicious disposition, neglects to keep it securely, and any person is injured by it, he is *prima facie* liable for the injury, without proof of neglect in keeping such animal. He must keep it safely, or respond in damages for all injuries inflicted by it, without the fault of the person injured.

This court said in *Partlow v. Haggarty*, 35 Ind. 178, that "Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or fault in the securing

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or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous disposition. Add. on Torts, 184. It was the duty of the defendant to see to it that so dangerous an animal was left in safe hands."

The neglect of the owner renders him *prima facie* liable to every person who is injured by such animal, after notice of its vicious disposition. It does not however render him absolutely liable. His negligence will not render him liable, if the negligence of the injured party contributed to the injury.

Judge Cooley, in his work on Torts, at page 346, says: "The doctrine of contributory negligence applies to the case of injury by animals." The same is asserted in section 199 of Shearman and Redfield on Negligence, and has been recognized as a rule of law, applicable to all the cases brought to recover for such injuries—*Smith v. Pelah*, 2 Str. 1264; *Woolf v. Chalker*, 31 Conn. 121; *Blackman v. Simmons*, 3 C. & P. 138; *Loomis v. Terry*, 17 Wend. 495; *Munn v. Reed*, 4 Allen, 431.

As the gravamen of the action is negligence, and as contributory negligence by the injured party will preclude a recovery, the complaint should aver that the plaintiff was without fault. It is true that each paragraph of this complaint is in accordance with the forms in Chitty, Abbott, etc., but these forms are in actions of negligence, and cannot be regarded as sufficient in this State, under the rule established in 2 Ind. *supra*.

For these reasons we are of opinion that the same rule applies to this case, and that the court erred in overruling appellant's demurrer to each paragraph of the complaint.

It is therefore ordered, upon the foregoing opinion, that the judgment be, and is hereby in all things reversed, at the costs of the appellee John Moray, with instructions to sustain the demurrer, with leave to amend.

So ordered.

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(74 Ind. 378.)

Municipal corporation — defect in street — notice.

Notice to a city councilman of a defect in a street of the city is notice to the city, although the councilman is not at the time engaged in any official act. (See note, p. 84.)

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ACTION for personal injury by defect in a street. The opinion states the case. The plaintiff had judgment below.

M. Winfield, for appellant.

D. C. Justice, for appellee.

WOODS, J. This was an action by the appellee against the appellant, to recover damages for an alleged injury to the plaintiff, received in driving over a bridge across a certain ditch in the city, which, it was alleged, the city had negligently suffered to be and remain out of repair.

The complaint, having stated the plaintiff's profession to be that of a physician and surgeon, and the injury, alleges "that before and at that time his professional services, as a physician and surgeon, were of the value of \$500 per month, and he was realizing and earning that sum therefrom; and by reason of the injury to his body and his great pain aforesaid, he was wholly incapacitated and rendered unfit and unable to practice his profession, and compelled to remain within doors, and lost for that time his aforesaid practice and the emoluments thereof, for a period of eight months, to his damage of \$4,000," etc.

Issue, trial, verdict and judgment for the plaintiff for the sum of \$1,133.

The questions discussed by counsel for the appellant arise on the motion, made and overruled, for a new trial, and they will be considered in the order presented by counsel.

The court gave the following instruction upon the subject of notice to the city of the defective condition of the bridge, viz.: "Notice to the councilmen or street commissioner is notice to the city."

It is insisted that this instruction is wrong in so much as it declares that notice to the councilmen is notice to the city. The argument is, that councilmen, regarded as individuals and not as a collective body, or as a committee of the collective body, have no powers over, and are charged with no duties with respect to, the streets of the city, and therefore that notice to them of a defect in a street does not affect a city. The argument appears not to be destitute of foundation; and if the premises be conceded, the conclusion must probably follow. It may be observed however that

the argument proceeds upon a phraseology somewhat different from that of the instruction. The latter says "notice to the councilmen," which naturally, if not necessarily, means all of them; not some or any of them, as is assumed in the argument. It is not an apt mode of expression to say "the councilmen," if reference is intended to the members of the council in their individual capacities and relations; and embracing, as it naturally does, all the members, the phrase is not inapt when a reference to the collective body is intended. Their coming or being all together, except in connection with their official duties, would be an unusual and improbable occurrence; and a reference to them as "the councilmen," in the instruction, may well be said to have meant the official body of councilmen. Properly understood therefore, the instruction was not erroneous upon the theory of law advanced by the counsel; and if he was apprehensive of a mistaken understanding of it, he should have moved for such explicit qualification or further instruction as was deemed necessary.

But suppose the instruction be interpreted as meaning the councilmen as such, but not as assembled in council; are they, or are they not, charged with any duty in reference to the streets of the city? Among the powers expressly conferred on the common council as a body, is to "have exclusive power over the streets; highways, alleys and bridges, within such city, * * * and to make repairs thereto." Sec. 61, Act of March 14, 1867; 1 R. S. 1876, p. 300. This power, as well as many others conferred in the same act, greatly concerns and affects the public welfare as well as private rights; and to the end that public and private interests may not suffer from a failure to exercise, or from negligence in the exercise of such powers, the law gives an injured party a remedy in damages against the city itself. To the same end it is provided in the law, that "The common council shall hold stated meetings at least twice in each month, and the mayor, or any five councilmen may call special meetings." Sec. 47 of Act of March 14, 1867. The provision for calling special meetings of the council was doubtless enacted in consideration of the fact, demonstrated by experience, that emergencies will arise, or may be reasonably expected to occur, requiring the early or immediate action of the council, and when to await the time for a regular meeting might entail disaster and loss, or at least the hazard of loss and liability, on the city. The power to call the council together in special meetings

may as well, and perhaps more frequently, be exercised in reference to the condition of the streets and bridges within the city, as any other subject of control by the council. The power to call such meetings, by necessary implication imposes the duty to make the call in proper cases. It is true that five councilmen are required to concur in the call, but the duty rests on each who has notice of the emergency, for it is manifest that the refusal of any one of five, who know of the necessity of a meeting, to join the other four in a call therefor, would not excuse the city from liability arising out of the failure to call such meeting. The duty growing out of the power to call special meetings, in proper cases, being therefore an individual duty imposed on each member of the council, it is incumbent on each, when informed of an emergency which requires the action of the common council, to notify the mayor or other councilmen, who may join in the necessary call; and if he negligently fails to perform this duty, the city is liable to any one who may suffer injury thereby.

We conclude therefore that notice to a councilman of a city, of the dangerous condition of a street or bridge within the city limits, is notice to the city. Our conclusion is fortified by a reference to the provisions of the law concerning the duties and powers of the street commissioner, as found in section 28 of the act of March 14, 1867, already referred to, namely:

“Sec. 28. It shall be the duty of the street commissioner, under the direction of the common council, to superintend the streets, alleys, market places, landings, the construction, repairing, cleaning and lighting the same, the building of sewers and drains, the purchase of the necessary implements of labor and the employment of laborers, and shall perform all the other duties incident to his office: *Provided*, he shall have no power to contract for any debt or liability against the city, unless specially authorized so to do by an order, resolution, or ordinance of the common council, made in accordance with the powers vested in such council by this act.”

But if the powers of the street commissioner were more ample and free from restriction, it would still be true, under the other provisions of the law to which we have adverted, that the councilmen have power, and a consequent duty, in reference to the streets of the city; and this conceded, nothing is wanting to support the conclusion already announced. The wisdom of the rule, which makes notice to councilmen notice to the city, is shown by a con-

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sideration of the fact that councilmen are elected from the different wards of the city, and each is likely to observe, or at least soon to learn of, the dangerous condition of any of the streets or bridges in his ward or neighborhood, and by prompt action to secure the necessary repairs or protection against danger. In the dissenting opinion it is affirmed to be the universal rule "that the governing officers of a corporation, such as directors and trustees, must, in order to bind the corporation, act as a collective body, and in regular and lawful session," and that this rule applies with peculiar force to the officers of municipal corporations "discharging duties for the benefit of the public, and not for the promotion of private interests."

This principle is doubtless true and applicable to all subjects concerning which the council must act, if at all, as a body, but it does not seem to us to apply to the subject of notice. Notice to the street commissioner or to the mayor is not notice to the council itself, but is notice to the city, on which the council must act in order to save the city from liability; and the application of the rule contended for would relieve the council from the responsibility of acting on such notice, as well as upon notice to an individual member of the council. The street commissioner and mayor themselves can do nothing to repair a street or broken bridge, if it requires the incurring of any debt or liability against the city, and yet notice to them is sufficient. The mayor can discharge his duty by calling the council together for the purpose of enabling it to take steps to have the street made good. But suppose the councilmen ignore the call of the mayor and neglect to assemble in lawful session; the repairs are not made and some one is injured. The city is held liable, but why? Not on account of any fault of the mayor or street commissioner; they have each done their whole duty under the powers conferred on them; not on account of any negligence of the common council, because that has not been in session and could not act. But unless there has been fault somewhere and in somebody who represented the city, there can be no liability at all. It is clear that the only fault is in the individual councilmen in failing to assemble, and for that fault the city is made responsible.

If the doctrine is enforced that the city is not liable for the conduct of councilmen but only on account of the action of the council in lawful session, then notice to all the councilmen, though assembled together in the council hall, would not be good if given just

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before the commencement or just after the close of the session. Such a proposition does not command the assent of conscience and reason and can hardly be accepted as the rule of law. For the purpose of receiving notice the councilmen of a city under our statute are at all times the agents of the city, and within a reasonable time after receipt of notice must move in the discharge of the duty so imposed upon them. It may be said that the presumption is that the council has furnished and put at the disposal of the ministerial officers the funds necessary to meet the expenses of emergencies, but presumptions of such a nature are by no means always true, and the rules of law must be applicable in all cases, and wherein the presumptions fail as well as when they hold good. It may be enough to guard against danger without making repairs, and the ministerial officers in most cases may be bound and able to provide the necessary safeguards; but cases are supposable when they cannot do so. The mayor and street commissioner may be absent from the city, or sick or dead; or they may have resigned; and in such cases, unless notice to the councilmen be good, there could be no notice at all. In such cases the public interests imperatively require that the councilmen shall represent the city; and it being conceded that notice to the councilmen must be good in some cases, there can be no good reason for not holding it good in all cases.

[Minor matter omitted.]

Judgment affirmed, with costs.

NOTE BY THE REPORTER.—ELLIOTT, J., dissenting, said: "In my judgment notice to an individual councilman is not notice to a municipal corporation, unless the councilman was at the time engaged in the business of the municipality."

"It is necessary, at the outset, to determine the relations which members of the common council sustain to the corporation. Municipal corporations are political organizations instituted for public and governmental purposes. The whole interest is in the public; neither corporators nor officers have any private interest either in corporate property or corporate affairs. Councilmen are *quasi* public officers, with powers, duties and liabilities very closely resembling those of public officers of the State. *Newman v. Sylvester*, 42 Ind. 106. The common council are the governing legislative officers, and possess in some degree the attributes of local legislative sovereignty; but no body of municipal officers constitutes the corporation, nor do all the officers combined constitute the corporation. The inhabitants constitute the body corporate. Mr. Grant says: 'The council' are 'the ministers or agents of the corporation; but it is to be remarked that the council are neither *the* corporation, nor are they in themselves a corporation.' *Grant Corp.* 357. The same doctrine is declared in *Lowber v. Mayor, etc.*, 5 Abb. Pr. 325, and *Clarke v. City of Rochester*, 24 Barb. 446.

"The common council are not general agents, on the contrary, they are special agents, with limited statutory powers. *Johnson v. Common Council, etc.*, 16 Ind. 227. Their powers are defined by statute, and the mode of exercise is explicitly prescribed.

"It is an elementary principle, that where powers are conferred upon a corporation, public or private, and the mode of exercise is prescribed, the powers conferred must be

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exercised in the prescribed mode. Our general law for the incorporation of cities does prescribe the mode in which the powers devolved upon the common councils of the cities of the State shall be exercised.

"It cannot be doubted that our statute requires that all official acts of the common council shall be done by the members when convened in regular or special session. This is indeed the general rule, irrespective of express statutory enactments. It must follow from the familiar principles referred to, that the councilmen act for and represent the city only when sitting in lawful session. If it be granted that councilmen represent the municipality only when engaged in the discharge of their duties in the municipal legislature, then it must also be conceded that an individual councilman does not at other times and places act as the agent of the corporation. It seems clear to my mind that the minor proposition is necessarily bound up and involved in the principal one.

"I may be pardoned, I trust, for referring to some considerations which support the proposition that councilmen are agents only when engaged in discharging the functions of their office. Less than a quorum of the council can do no valid act. *City of Logansport v. Legg*, 20 Ind. 315; *State v. Wilkesville Township*, 20 Ohio St. 288. A record of proceedings must be kept and signed in the manner provided by statute. *South School District v. Blakeslee*, 13 Conn. 227; *Denning v. Roome*, 6 Wend. 651; *Moser v. White*, 29 Mich. 59. Their modes of procedure are analogous to and governed by the rules applicable to legislative bodies. Dill, Mun. Cor., § 288. Meetings must be held at the lawfully designated times. Powers of the council cannot be delegated to individual members. *White v. Mayor, etc.*, 2 Swan, 364; *Day v. Green*, 4 Cush. 433; *Smith v. Morse*, 2 Cal. 524.

These examples are sufficient to show, although illustrations might be multiplied, that the council, as a collective body, are the agents, and not individual councilmen at their respective homes and places of business, scattered about the city.

"Turning for a moment to the law governing private corporations, we shall find strong confirmation of the general doctrine affirmed in this opinion. One director cannot bind the corporation by admissions or contracts. It requires the vote of a majority of all the directors, in regular and lawful session, to impose binding obligations upon the corporation. *Price v. Grand Rapids, etc., R. Co.*, 13 Ind. 58; *Brooklyn Gravel Road Co. v. Slaughter*, 33 Id. 185. A contract made by a majority of directors at an informal and irregular meeting, imposes no liability upon the corporation. *Barcus v. Hannibal, etc. Co.*, 26 Mo. 102; *Cram v. Bangor House Proprietary*, 12 Me. 354. Without prolonging this discussion by citation of cases, which indeed is not necessary, as the principle is so firmly settled and well known, I affirm that the universal rule is, that the governing officers of a corporation, such as directors and trustees must, in order to bind the corporation, act as a collective body and in regular and lawful session. If this be the rule applicable to corporations, where directors and trustees have direct pecuniary interests, it certainly must be so in cases where officers of municipal corporations are discharging duties for the benefit of the public and not for the promotion of private interests.

"Fundamental principles of the law are the same, whether the corporation whose interests and rights are under discussion is a public or a private one. The general principle, as settled by a long line of decisions is, that notice to an individual director of a private corporation is not notice to the corporation, unless the director was at the time engaged in the transaction of corporate business. Among these cases are: *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Washington Bank v. Lewis*, 22 Pick. 24; *Farmers and Citizens' Bank v. Payne*, 25 Conn. 444; *Farrell Foundry v. Dart*, 28 Id. 376; *La Farge F. Ins. Co. v. Bell*, 23 Barb. 54; *Fullon Bank v. New York, etc., Co.*, 4 Paige, 127; *Louisiana State Bank v. Senecal*, 13 La. 525; *Powles v. Page*, 3 C. B. 16; *Edwards v. Grand Junction Ry. Co.*, 1 Myl. & C. 650; *Lancey v. Bryant*, 30 Me. 466; *Soper v. Buffalo, etc., R. R. Co.*, 19 Barb. 310; *Loomis v. Eagle Bank*, 1 Disn. 285; *Pemigewassett Bank v. Rogers*, 18 N. H. 255.

"The principle that notice to a corporate officer is not notice to the corporation, unless the officer was at the time of the notice engaged in some corporate business, applies as well to public as to private corporations. There is indeed, stronger reason for the rule in cases of public corporations. Private corporations are organized for selfish purposes, and officers are controlled by motives of self-interest; whereas public corporations are organized for governmental purposes, and the officers are vested with public trusts, and

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are not influenced by pecuniary or personal interest. It would violate all just principles of law and equity, to impose upon public corporations a broader responsibility for the acts of their officers than that devolved upon private corporations.

“Recurring again to fundamental principles we find that notice to an agent is sufficient only in cases where the admissions of the agent would bind the principal. This is incontestably so with respect to the officers or agents of private corporations. Dr. Wharton says: ‘Wherever an officer of a corporation can bind the corporation by his acts there notice to him will be notice to the corporation.’ Whart. Agency, § 184. Story Agency (8th ed.), § 140c. This doctrine logically follows from the cases cited, and is the only one which can be harmonized with settled principles. It is certain that an agent’s admissions bind his principal only when made while engaged in transacting the business of the principal. Accepting as correct these fundamental principles it follows as an unavoidable logical conclusion that notice to an individual councilman, not at the time engaged in the performance of an official duty, is not notice to the municipality.

“The conclusion just expressed is that reached by one of the soundest lawyers and thinkers of our day. Judge DILLON, speaking of the declarations of municipal officers says: ‘To render such declarations and admissions evidence they must accompany acts, which acts must be of a nature to bind the corporate body.’ Dill. Mun. Corp. 8d ed., § 237, note 1. The opinion of the eminent author quoted is sustained by many authorities. See authorities cited in note to section 237, and in note to section 305. There are other cases sustaining the doctrine herein maintained. In the case of *Bush v. Trustees of Geneva*, 3 T. & C., 409, it was held that notice to two of several town trustees of a defect in a street was not sufficient, and in *Peach v. City of Utica*, 10 Hun, 477, it was decided that notice to an alderman was not notice to a corporation.

“Cases decided by the Supreme Court of Maine are cited by the appellee as sustaining the doctrine sanctioned by the majority opinion. These cases go much further; so far indeed as to carry their own condemnation upon their faces, for they hold that notice to an inhabitant is notice to the town. It is true that some of these cases speak of ‘a principal,’ or ‘the principal,’ inhabitants, but this qualification is of little practical force where all inhabitants are, in theory if not in fact, sovereigns and equals. It would be, to say the least, a very hard and ungracious task for a court to undertake to sift the inhabitants of the smallest city and single out the principal ones. Aside from this, the doctrine, if applied to such cities as New York, Philadelphia, Chicago or Boston, would work the rankest injustice. It would have the same effect even in cities such as Logansport; for it would be inequitable to hold that notice to one, ten or twenty, out of twelve thousand inhabitants, should fasten a burden upon all the other corporators. I know that the majority opinion sanctions no such doctrine, but it does, as it seems to me, depart from settled principles, and when once this is done there is no longer certainty, for we are drifting without guides or restraints, and may at last reach some such erroneous result as that to which the departure from settled principles has carried the courts of our sister State.

“The underlying principle of agency is that the agent derives his authority from the voluntary appointment of the person whom he represents. No one councilman is appointed by the municipality, and therefore no one councilman can be deemed the agent of the corporation. All the councilmen are so appointed, because all the councilmen, when assembled in legal session, are the chosen or appointed agents of the whole number of corporators. Individual councilmen are selected by the corporators of particular localities or wards, and it is only when acting in conjunction with councilmen chosen by other wards or localities that they can be correctly said to be agents of the city. The corporators of the municipality ought not to be bound by the acts or omissions of one man, with whose appointment they have nothing at all to do. If the converse of the proposition which this opinion endeavors to sustain be true, then it would follow that a councilman from ward one could bind all the inhabitants, by the receipt of notice of a defect in a street in ward twenty, although ward twenty was five or twenty miles distant from ward one. It would also follow, I suppose, if the converse of the proposition named be correct that notice to the most dissolute and unworthy member of the common council, elected from a single ward, would impose a burden upon the inhabitants of a score of other wards, although they had no part in selecting him. Other considerations might readily be suggested in support of the proposition that the common council, as a collective body, are

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the agents of the city, and that individual councilmen are not, but this discussion has been already too much prolonged, and I shall neither suggest nor discuss them.

"Councilmen are not in the continuous employment of the city. Their powers and duties do not require them to devote all their time to the corporate business. There is not the slightest resemblance between the authority of a councilman and that of a general agent intrusted with the general management of his principal's affairs. Nor is there any similarity between the authority and duty of a councilman and that of such officers as the mayor, street commissioner, treasurer or clerk, who are constantly and uninterruptedly in office for the terms for which they were elected, and whose official duties are regular and continuous. The common council must meet in regular session within ten days after their election. § 46, General Act. They must fix regular times for meetings. Stated meetings must be held twice in each month. A majority of the members constitute a quorum for the transaction of business. § 47.

"Without multiplying citations, it may, as I think, be safely affirmed that our statute means that individual councilmen shall be deemed agents of the city only when engaged in some act expressly delegated to them, or when sitting as members of the council convened in lawful session. This conclusion is strengthened by the fact that other officers, such as the mayor, marshal and street commissioner, are continuously in office, charged with ministerial duties; while those of the councilmen are almost exclusively legislative.

"It may be broadly granted that ministerial officers have no right to appropriate the money of the corporation to the repair of streets, and the force of the argument be in no respect impaired. The presumption is, that the municipal legislature has made and placed within the reach of ministerial officers proper appropriations for guarding and protecting dangerous defects. It is not to be presumed that the councilmen have been derelict in this respect; upon the contrary, the presumption is that they have done their duty in this, as in all other official matters.

"Municipal corporations are not, as a general rule, bound to repair or improve; there is no such absolute duty resting upon them; but they are bound to make safe dangerous places in the highways. This may be done by placing about the dangerous places barricades or warnings and signals of danger; there is no imperative duty to rebuild or repair. A ministerial officer may well be charged with the duty of placing about a dangerous place the proper barricades or warnings, but one would hardly ascribe such a duty to a legislator. Notice, to be effective, should be given to the officer charged with the specific ministerial duty and invested with the requisite authority, and not to officers whose duties are never ministerial in the true sense, but always legislative.

"The salary or compensation which the statute awards councilmen shows very clearly that it was not intended that they should be general agents, continuously representing the city. The compensation is explicitly limited to an annual salary not exceeding one hundred and fifty dollars per annum, and another provision prohibits members of council from directly or indirectly receiving any other compensation. Independently of such a provision, they could not rightfully receive any other compensation than that expressly provided by statute. *Smith v. City of Albany*, 61 N. Y. 444. It will hardly be contended that a man of average business capacity, or ordinary intelligence, could be expected to give all his time and attention to corporate affairs for such a paltry compensation as that prescribed by our statute. If councilmen are not general agents, they cannot bind the corporation by admissions, nor will notice to them be effectual as against the municipality. It is well settled that notice to a special agent is not notice to the principal, unless the agent was at the time engaged in conducting the transaction in behalf of his principal. *Whart. Ev.*, § 1175. Notice to individual councilmen, engaged about their own affairs upon the street, or in the shop, store or home cannot, without doing violence to this settled principle, be deemed notice to the corporation of whose legislative body they are members.

"If councilmen are the general agents of the city, charged with the duty of receiving and acting upon notice of defects in public highways, then for culpable negligence in failing to perform that duty, they are liable to their principal. It cannot be assumed that there exists a duty to act upon notice, without also assuming that for a wrongful refusal, or a negligent failure to act, there is a corresponding burden of liability for injury resulting from such wrongful refusal or a negligent omission. I cannot bring my mind to

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the conclusion that for the pitiful compensation provided, the legislature ever intended there should be any such duty or any such correlative burden. It cannot be successfully asserted that there is such a duty, but no burden. It is a vain thing to imagine a duty without a liability, save only in matters of a judicial nature. Let it once be understood that councilmen owe such a duty, accompanied by its inseparable burden, and men of character and responsibility will shun the office, and the government of our cities will fall into the hands of the unworthy and irresponsible, reckless alike of duty and liability. The office of councilman should not be incumbered with any such grievous burdens, for it is evidently intended to be one of honor rather than of profit. Possibly, I grant, little of either in most cases.

"It seems to me that undue importance is attached to the provision of the statute authorizing five councilmen to call a special meeting. This provision superadds no powers, creates no additional duties. It merely confers authority to call such meetings; for without it there would be no such power. It does not broaden the authority of the agents, nor does it increase their liability. This isolated provision ought not, I submit with all possible deference and respect, to be allowed to overthrow the whole body of the statute and strike down long and firmly settled principles. It was never meant to have any such effect. It was not intended to require individual councilmen to carry into workshop, store, office or home, their representative character. The burden imposed by such a construction would be almost as annoying to the ordinary man of business as was the 'Old Man of the Sea' to 'Sindbad the Sailor.'

"There is no reason growing out of public policy requiring such a rule as that which the court has adopted. Persons who traverse the streets are well protected. Express notice to the chief executive officer, or to the ministerial officer or agent having direct charge of the streets, is sufficient to charge the municipality. Not only this, but if the defect has existed for such a length of time as that the corporation ought to have taken notice, it will be held to have had notice. Even more than this, corporate authorities are charged with notice of the probability of material, out of which streets, bridges and crossings are constructed, to become unsafe by exposure, and must take measures to guard against injury from such cause. Surely these rules guard sufficiently the rights of persons who travel upon the public highways, and to add other burdens will be to oppress our public corporations, the corporators of which receive no personal interest whatever from the rights and powers conferred by the incorporating act."

 REED V. LEWIS.

(74 Ind. 433.)

Landlord and tenant — restriction of use of premises.

A lease described the premises, consisting of five acres, by metes and bounds, and concluded as follows: "Containing a certain steam saw-mill, dwelling house," etc., with the privilege of using all the timber on the premises, but restricting the use of the valuable timber to mill purposes or the improvement of the premises. *Held*, not to restrict the use of the premises to mill purposes.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

W. S. Shirley and J. H. Jorden, for appellants.

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G. W. Grubbs and M. H. Parks, for appellees.

BICKNELL, C. This was a suit by the appellants as assignees of a lessor, against the assignees of a lessee and their sub-tenants.

The appellees demurred to the amended complaint for want of a sufficient cause of action; the court sustained the demurrer, and final judgment was rendered against the appellants.

The amended complaint avers, that on the 2d of January, 1863, William Reed and Peter Applegate agreed in writing that said Reed, in consideration of the covenants herein mentioned, of said Applegate, doth hereby demise, grant and lease unto him, his executors, administrators and assigns — but there is to be no assignment to any other than said Reed, if he will pay the price for the machinery offered by other parties — from the 2d day of February, 1863, until the machinery on the herein described premises shall be removed, the following real estate, to wit: Then follows a description by metes and bounds, with the statement that the said metes and bounds shall contain five acres, which description concludes thus: "Containing a certain steam saw-mill, dwelling-house" etc., and, "in consideration of said lease, the said Applegate covenants and agrees to operate said mill as a lumber mill during a part or all of the time it shall remain on said premises. The said Reed grants to said Applegate the privilege to use all the timber on said premises, reserving all the valuable timber, to be used only for mill purposes or improvement of said premises;" that at the date of this lease said Reed owned forty acres of land, on which were no improvements except said steam saw-mill and said dwelling-house used in connection therewith; that said Applegate kept the saw-mill in operation two years, and then assigned the lease to Lewis and Wigall, two of the appellees; that in July, 1872, said Reed conveyed the entire forty acres to the appellants, and that the appellees, Lewis and Wigall, without consent of appellants, have laid off and inclosed upon said five acres, two lots, and have built a house on each of said lots, which houses are occupied by Miller, Cavanness and Wyatt, three of the appellants, as sub-tenants of said Lewis and Wigall, but not in connection with said saw-mill; that in 1874 said Lewis and Wigall, without the consent of the appellants, built and inclosed upon said five acres, a steam flour and grist mill, and a hog-pen, and have ever since continued to use the same; that thereby the appellants are deprived of the use of said five acres or any part

thereof; that the appellees refuse to pay any rent to the appellants; that said Lewis and Wigall are receiving all the rents for said two houses and for said flour and grist mill, to the damage of the appellants \$500; that appellants, before suit brought, demanded of the appellees possession of said premises, except said saw-mill and dwelling-house, and except so much of said five acres as was used in connection with the saw-mill and dwelling-house. The amended complaint demanded judgment for the possession of said two dwelling-houses, and of said flour and grist mill, and for \$500 as the rent thereof, and for possession of all of said five acres, except what is necessary for said saw-mill and the dwelling-house connected therewith, and that the appellees be enjoined from using and occupying said five acres, except in connection with the use of said saw-mill and dwelling-house, and that the appellants may have all other proper relief. The error assigned is, that the court erred in sustaining the demurrer to the amended complaint.

The complaint, as amended, assumes that the five acres were leased for the sole purpose of operating a saw-mill, and that any other use of the demised premises is therefore unwarranted. Where the mode of occupation is fixed by the lease, or where the purpose of the lease is expressed therein, or where the intention of the parties to confine the leased premises to a special use may be fairly implied from the words of the lease, then the tenant may be enjoined from converting the property to other purposes. 1 Washb. Real Prop. 546; *Steward v. Winters*, 4 Sandf. Ch. 587; *Maddox v. White*, 4 Md. 72. But without such express language or such reasonable implication, there is no such restriction upon the tenant.

The writing in controversy in this case is not a lease of a saw-mill and five acres of land to be used only for the purposes of the mill, it is a lease of five acres of land, described by metes and bounds; and the subsequent words, "containing a certain steam saw-mill and dwelling-house," etc., do not limit the extent of the grant. There is nothing in the instrument from which it can be inferred that the parties intended to confine the use of the land to the requirements of the saw-mill; on the contrary, the lessor agreed that the lessee and his assigns might use, for any purpose, all the timber on the premises, reserving only the valuable timber "for mill purposes or improvement of the premises." The fair construction of the instrument is, that the saw-mill is to be operated while the machinery is there, and that the lease is to end when the ma-

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chinery is removed, and that the valuable timber must be used exclusively for mill purposes and for improvement of the premises.

It is not averred in the complaint that the saw-mill is not operated nor that the machinery has been removed, nor that the valuable timber has been misapplied, nor that the additional improvements on the five acres hinder in any way the use of the saw-mill and its dwelling-house.

The lease in controversy was uncertain in its duration. Leases for years must have a certain beginning and a certain ending, and so the continuance of the term must be certain. 1 Shep. Touch. 272; Co. Litt. 45 b.

Formerly, in cases of uncertain leases made until such a thing be done, or so long as such a thing shall continue, if livery of seizin were made upon them, they might have been good leases for life, determinable upon these contingencies, although not good leases for years. Co. Litt. 45 b. n. 2. They were bad as leases, because of the uncertainty of their duration; they could not pass a fee for want of the word "heirs;" they were therefore held to create estates for life.

The lease in controversy is to continue until an uncertain contingency, to wit, the removal of the machinery; but as the word "heirs" is not now necessary to create a fee, and as every grant is construed most strongly against the grantor, and conveys all he has unless a lesser estate is expressed, it would seem that here an estate in fee was created, determinable upon the happening of the contingency.

The case resembles *Wickersham v. Bills*, 8 Ind. 387. There A., B. and C. granted to E. the right to use and improve a mill-dam and race on their land, on condition that E. should build and run a grist mill, and that if he, or those holding under him, should fail to build the mill, or fail to keep it in operation, then the grant should cease. After building the mill, E. died, and his heirs sued the grantors for disturbing their possession of the mill and race. The defendants answered, setting up the foregoing facts, and claiming that E., the ancestor of the plaintiffs, held under them as tenant for life, and that he being dead, the mill had reverted to them, and they had taken possession of it. To this answer the plaintiffs demurred; it was held in this court that the demurrer was rightly sustained. The court said: "We think it equally clear that his heirs should be considered as holding under him, within the inten-

tion of the parties." In other words, they held that the grantees did not take an estate for life.

But whatever may be the estate created by the instrument in controversy, the amended complaint contained no sufficient cause of action, the demurrer to it was rightly sustained, and the judgment of the court below ought to be affirmed.

It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the cost of the appellants.

ON PETITION FOR A REHEARING.

BICKNELL, C. It is a clear proposition that leases of an uncertain duration are not valid leases for years. Upon such a point it is unnecessary to repeat the authorities cited in the foregoing opinion. As to the contract in suit, even if there were no element of uncertainty as to its duration, even if it were to endure for a fixed term of years by its expressed provisions, a complaint thereupon, with the same statements and claiming the same relief as the complaint in this case, could not be sustained.

The petition for a rehearing assumes that here was a lease for the sole purpose of operating a saw-mill, and that the intention of the parties was that the land was to be used for saw-mill purposes only, and that any other use of the property would violate the contract and make the occupant liable to pay the other party a compensation for such use; but the intention of the parties must be gathered from the language of the contract, and where that is plain, and there is no mistake in it, it is conclusive. The writing in this case begins thus: "This agreement made and entered into," etc.; then follow the words, "demise, grant and lease the following real estate," giving its metes and bounds; then come the words, "containing a certain steam saw-mill, dwelling-house," etc.; then follow the words which grant to the party of the second part "the privilege to use all the timber on said premises," with the restriction however that "all the valuable timber shall be used only for mill purposes, or improvement of said premises." This last language evidently contemplates not only a use for mill purposes, but improvement of the premises besides; the "premises" were the land granted; there is nothing in any of the words of the grantor which indicates a lease of a saw-mill and five acres of land, to be used only for the purposes of the saw-mill, the value of the timber was to be used only

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for the purposes of the saw-mill, that was all. Now look at the covenants of the occupant: he agrees "to operate the saw-mill during a part or all of the time it shall remain on said premises," and that he will not assign to any other than the grantor, "if he will pay the price for the machinery offered by other parties;" there is no stipulation on the part of the occupant that he will not use the five acres except for mill purposes. The instrument not only leaves him absolutely untrammelled and free as to the use of the premises, but it expressly provides for the use of the valuable timber for the improvement of the premises and for mill purposes also. In any valid lease the tenant, if not restrained by the terms of the lease, may use the premises for any lawful purpose. Yet the appellant claims a forfeiture and damages and rent for the flouring mill, and compensation for every use of the property except the use for the saw-mill. There is no ground for forfeiture; there has been no waste; no covenant, express or implied, has been broken, and there is nothing in the agreement which warrants any such damages or compensation as the appellee in his complaint demands.

The petition for a rehearing ought to be overruled.

Petition overruled.

CITY OF GREENCASTLE V. MARTIN.

(74 Ind. 449.)

Municipal corporation — unsafe pound — injury to cattle impounded — remote cause.

A city is liable in damages for an injury to an animal impounded by it, when caused by the improper tying of the animal, and by the insufficient height of the fence. But where the fence is of the ordinary height, and the animal hurts itself by wild and vicious attempts to overleap it, the city is not liable by reason of the improper tying, nor by reason of a failure to post notices and sell the animal within the statutory time.

ACTION of damages for injury to an impounded animal by negligence. The opinion states the case. The plaintiff had judgment below.

T. Hanna, S. A. Hays, and W. H. Crow, for appellant.

H. H. Mathias, C. C. Matson, D. E. Williamson and A. Daggy, for appellee.

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BICKNELL, C. The city of Greencastle had an ordinance to prevent certain animals from running at large in the city. The ordinance required the city marshal to take up and impound such animals, and to give immediate notice thereof by posting; and if the owner should fail to appear within forty-eight hours after the posting, then to sell the animals, etc. Under this ordinance, the city marshal took up and impounded the appellee's mare, and kept her in the city pound, from Monday until the next Friday morning, without any posting or offer to sell; and then the mare jumped over the pound fence and broke her leg, and thereby became valueless, and was killed by the marshal.

No question is made as to the authority of the city to enact and enforce said ordinance.

The complaint seeks to recover damages from the city for the alleged negligence of the marshal. It contains three paragraphs; the appellee concedes that the third paragraph was bad. The first paragraph charges negligence; the second paragraph charges a conversion.

Demurrers to the first and second paragraphs were overruled. A motion to strike out from the first paragraph all the allegations of negligence, except as to the alleged improper construction of the pound, was overruled. The appellee answered in two paragraphs, the first of which was the general denial. A demurrer to the second paragraph of the answer was overruled; and a reply was filed in denial of said second paragraph. The issues were tried by a jury, who returned a verdict for the appellee.

The appellant's motion for a new trial was overruled, and judgment was rendered upon the verdict. The appellant assigns errors as follows:

First. The court erred in overruling the demurrers to the first and second paragraphs of the complaint.

Second. The court erred in overruling the motion to strike out part of the first paragraph of the complaint.

Third. The court erred in overruling the motion for a new trial.

The appellant urges, that for such injuries as are set forth in the first paragraph of the complaint, cities are not liable.

There are conflicting authorities upon the liability of municipal corporations for the acts of their servants, but the law of Indiana is as follows: "Municipal corporations are responsible to the same extent, and in the same manner, as natural persons, for injuries

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occasioned by the negligence or unskillfulness of their agents in the construction of works for the benefit of the cities or towns under their government." *Ross v. City of Madison*, 1 Ind. 281; *Stackhouse v. City of Lafayette*, 26 id. 17; *Brinkmeyer v. City of Evansville*, 29 id. 187.

The material averments of the first paragraph of the complaint are: "That said injury to said mare was caused by the negligence and unskillfulness of the defendant and its servants, in this, to wit: The defendant so negligently and unskillfully constructed the said fence, surrounding said inclosure or pound, that the same was not sufficient in height to prevent animals therein confined from jumping out, or attempting to jump out; that the defendant, by its servants, negligently tied said mare next to said fence, and with rope sufficiently long to enable the mare to jump over said fence, without breaking said rope at its fastening; that said defendant, by its servants, negligently failed to give notice of the taking up and impounding of said mare immediately thereafter, as by said ordinance required to do; that said defendant, by its servants, negligently failed to offer said mare for sale, within the time by said ordinance required. And the plaintiff further says, that said injury to said mare was not caused by any fault or negligence on his part, and that by reason of such injury, so caused by the negligence and unskillfulness of the defendant and its servants, he is damaged," etc.

So far as this paragraph alleges that the fence was not high enough, and that the mare was improperly tied, and that thereby, without fault of the appellee, the damages were sustained, it contains a good cause of action, under the authorities hereinbefore referred to. See also, *Mayor v. Furze*, 3 Hill, 612; *Rochester W. L. Co. v. City of Rochester*, 3 N. Y. 463; *Lloyd v. Mayor*, 5 id. 369.

For any negligence of its agents in the construction of the pound, or in any purely ministerial duty under the pound ordinance, the city is liable, just as a private person would be for the acts of his agents. *Cooley on Torts*, 122, 379. There was therefore no error in overruling the demurrer to the first paragraph of the complaint.

[Omitting minor considerations.]

In the first paragraph of the complaint negligence is charged in four particulars: First, in building the pound fence too low; second, in tying the mare with a rope too long; third, in failing to post up notice of the impounding; fourth, in failing to offer the mare for

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sale at the end of forty-eight hours after the posting. The averment is that these acts of negligence caused the injury. But upon the trial no witness testified that the fence was too low; no witness testified that the mare was improperly tied, or that the failure to post notices or the failure to sell produced the injury complained of, or had any tendency to produce it. The only testimony upon these points was as follows:

[Omitting this.]

The appellee seems to have supposed that the mere fact that the mare jumped the fence warranted the inference that the fence was too low; but there is no room for such an inference against the uncontradicted testimony that the fence was sufficient.

The failure to post up notices and the failure to offer to sell were undoubtedly such negligence as might make the city liable for any injury caused thereby; the duty of the marshal in relation to these matters is a duty to the owner of the animal, and these are matters of a ministerial nature, within the scope of the actual and ostensible authority of the officer, and within the power of the city. But the question remains, was the injury in this case caused by the failure to post notice and the failure to sell? It followed those failures, but mere sequence amounts to nothing. The appellee in his brief puts the argument thus: "If said mare had been advertised and sold she would have had two days' advantage of the calamity;" but the same might have been said if some stranger had poisoned or shot the mare in the pound on the fourth day.

There must be some connection between the negligence and the injury in the way of cause and effect; and the negligence which creates liability must be the proximate cause of the injury. In 2 Greenl. on Ev., § 256, it is said: "The damage to be recovered must always be the natural and proximate consequence of the act complained of." Proximate cause is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. Shearman & Redfield on Neg. 11.

Sometimes the injury is *prima facie* evidence of negligence, as in case of fire from the sparks of a railway engine. *Piggot v. Eastern, etc., Ry. Co.*, 3 C. B. 229. So in case of a railway engine running off the track. *Carpue v. London, etc., Ry. Co.*, 5 Q. B. 747. But even in such cases there can be no recovery, unless the negligence was the proximate cause of the injury. *Pennsylvania Co. v. Hensil*, 70 Ind. 569; s. c., 36 Am. Rep. 188.

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In the case of *Fent v. Toledo, etc., Ry. Co.*, 59 Ill. 349; s. c., 14 Am. Rep. 13, LAWRENCE, C. J., delivering the opinion of the court, said: "If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause." The defendant is to be held responsible, "if the loss is a natural consequence of its alleged carelessness, which might have been foreseen by any reasonable person, but is not to be held responsible for injuries which could not have been foreseen or expected, as the results of its negligence."

These authorities are applicable to the present case. The fence being sufficient in itself, as shown by the testimony, it could not have been foreseen or expected that a failure to post notices would produce the wild act of the animal, which caused its death. When a fence is shown to be sufficient it is as good for four days as for two.

In *Marble v. City of Worcester*, 4 Gray, 395, a horse running away threw down and hurt the plaintiff; the horse was frightened by a vehicle striking against a defect in the highway. It was held that the city was not liable.

So although there be negligence in the defendant, enough to warrant a recovery if there were no fault on the side of the plaintiff, yet the plaintiff cannot recover, if the injury were really the result, in part, of "the blind violence of his animal, acting without guidance or discretion." *Davis v. Inhabitants of Dudley*, 4 Allen, 557; *Titus v. Inhabitants of Northbridge*, 97 Mass. 258.

The principle is, that where a duty imposed is manifestly intended for the protection of individuals, the law will give a remedy; but nobody is bound to protect a man against his own fault or against the wild and breachy action of his own domestic animals. There was no negligence in this case which was the proximate cause of the injury. The animal ruined herself by a wild and vicious effort to overleap a fence sufficient to confine any ordinary animal of the horse kind.

The verdict was not sustained by sufficient evidence and was contrary to law. The motion for a new trial ought to have been granted, and the judgment below ought to be reversed.

It is therefore ordered upon the foregoing opinion that the judgment below be and the same is hereby in all things reversed, at the costs of the appellee.

Petition for a rehearing overruled.

CITY OF DELPHI V. LOWERY.

(74 Ind. 520.)

Municipal corporation — negligence — defect in street — evidence — notice.

- In an action against a city for an injury occasioned by a defect in a street, evidence is competent to show previous similar accidents at the same point, and the records of the common council are competent to show the report of a committee appointed by them, and their action thereon in respect to the defect in question.

ACTION of damages for negligence causing death. The opinion states the case. The plaintiff had judgment below.

C. R. Pollard, L. E. McReynold, J. R. Coffroth and C. B. Stuart, for appellant.

J. Applegate and N. O. Ross, for appellee.

ELLIOTT, J. The questions which the record of this case presents arise upon the ruling denying appellant's motion for a new trial. William A. Lowery, the appellee's intestate, lost his life by drowning in the Wabash and Erie canal, at a point within or near the corporate limits of the city of Delphi. There was evidence tending to prove that the intestate's death was attributable to the negligence of the appellant in failing to place barricades about the dangerous place, or to guard it by signals or warnings of danger. There was also evidence tending to show that it was the duty of the city to properly protect passengers from danger, inasmuch as one of the public streets of the city either ran up to and across the dangerous place or terminated in very close and direct proximity to that point.

[A minor inquiry omitted.]

Evidence was given by the appellee, that other persons had received injuries at the place where the deceased was drowned, at times anterior to his death. This the appellant contends, with vigor and ability, was erroneous. There is some conflict in the authorities. In *Collins v. Inhabitants of Dorchester*, 6 Cush. 396, such evidence was declared incompetent. It was said to be "Testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the de-

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fendants were not bound to be prepared to meet." In support of the conclusion of the court, the following authorities were cited: *Standish v. Washburn*, 21 Pick. 237; 2 Stark. Ev. 381; 1 Greenl. Ev., § 52, 448. The cases of *Aldrich v. Pelham*, 1 Gray, 510; *Kiddler v. Dunstable*, 11 id. 342; *Blair v. Pelham*, 118 Mass. 420, assert substantially the same doctrine as *Collins v. Dorchester*, *supra*.

In *Darling v. Westmoreland*, 52 N. H. 401; s. c., 13 Am. Rep. 55; the doctrine of *Collins v. Dorchester* is vigorously assailed in an unusually able and elaborate opinion; and the opposite doctrine declared to be correct, both upon reason and authority. In the recent case of *Moore v. City of Burlington*, 49 Iowa, 136, the court adopted in effect, although not expressly, the rule declared in the New Hampshire case. The Supreme Court of Illinois declared, in the case of *City of Chicago v. Powers*, 42 Ill. 169, that such evidence was competent. It was said in that case: "It is insisted that the court erred in admitting evidence that another person had fallen through the same bridge. If this evidence was admissible for any purpose then it was not error. The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate at the same place and from a like cause, it would tend to show a knowledge on the part of the city that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide further means for the protection of persons crossing on the bridge. As it tended to prove this fact it was admissible; and if appellants had desired to guard against its improper application by the jury, they should have asked an instruction limiting it to its legitimate purpose." In *Kent v. Town of Lincoln*, 32 Vt. 591, it was held competent to prove that other persons than the complainant had at previous times been injured by the same defect in a highway. A similar ruling was made in the case of *Quinlan v. City of Utica*, 11 Hun, 217. This case was affirmed without comment by the Court of Appeals, 74 N. Y. 603. In *City of Augusta v. Hafers*, 61 Ga. 48; s. c., 34 Am. Rep. 95, the doctrine maintained by the cases cited was declared and enforced. The Supreme Court of the United States in *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, held that it was competent for the plaintiff, in an action for injury resulting from fire communicated by the locomotives of a railway company, to prove that during the summer preceding the burning of plaintiff's property, fire was often scattered from the

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locomotives of the defendant when passing plaintiff's property. In *Hoyt v. Jaffers*, 30 Mich. 181, it was held proper to prove that sparks had, at other times than that on which the injury sued for occurred, been emitted from a chimney. The doctrine of the cases cited is supported by many adjudged cases, among them: *Aldridge v. Great Western Ry. Co.*, 3 M. & G. 515; *Huyet v. Philadelphia, etc., R. Co.*, 23 Penn. St. 373; *St. Joseph, etc., R. Co. v. Chase*, 11 Kans. 47; *Longabaugh v. Virginia City, etc., R. Co.*, 9 Nev. 271; *Pennsylvania R. Co. v. Stranahan*, 79 Penn. St. 405; *Annapolis, etc., R. Co. v. Gantt*, 39 Md. 115; *Dougan v. Champlain, etc., Co.*, 56 N. Y. 1; *Field v. New York, etc., R. Co.*, 32 id. 339.

This court has adopted and enforced this doctrine. In the case of *Pittsburgh, etc., Ry. Co. v. Ruby*, 38 Ind. 294, this question was exhaustively discussed, and the point expressly ruled. It was there held that evidence of specific facts was competent for the purpose of charging the corporation with notice. We are unable to perceive any difference in principle between the case in hand and the class of cases of which those last cited are types. If specific acts are proper for the purpose of showing notice to the owners of machinery or the employers of servants, it must be competent for the purpose of showing notice to a municipal corporation that there is a dangerous place within or very near the limits of the highway. The cases directly ruling the point here under immediate mention outweigh the cases in Massachusetts, for the latter are all built upon a single and not very carefully considered case. The doctrine of the cases in that court cannot be reconciled with the doctrine of the class of cases represented by *Pittsburgh, etc., Ry. Co. v. Ruby*. This last doctrine has been recognized as sound by the Supreme Court of Massachusetts, and that court, able and distinguished as it confessedly is, has, it seems to us, thus sanctioned a doctrine inconsistent with that of *Collins v. Dorchester*. *Gahagan v. Boston, etc., R. Co.*, 1 Allen, 187; *Ross v. Boston, etc., R. Co.*, 6 id. 87. It also seems to us that the doctrine of *Collins v. Dorchester* cannot be harmonized with *Crosby v. Boston*, 118 Mass. 71, but we deem it unnecessary to prolong this opinion by a discussion of the conflict between these two cases.

There was no error in permitting the appellee to read in evidence the record of the common council showing the report of a committee appointed by that body, and the action taken thereon.

We are aware that this point has been differently ruled by the

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Supreme Court of Massachusetts in *Dudley v. Weston*, 1 Mete. 477, and *Collins v. Dorchester*, *supra*. The municipal corporation is represented by the common council, and the acts of that body done in regular session and within the scope of the powers conferred by the charter, are binding upon the corporation. Corporations can act only by agents, and certainly the authorized acts of the highest class of corporate agents in the discharge of the duties of their agency are competent against the principal. We are at a loss to imagine a higher degree of evidence than that supplied by the official acts of the common councilmen, performed in regular session of the municipal legislature. The Massachusetts rule is unsound upon principle, and is opposed by the very decided weight of authority. *Requa v. City of Rochester*, 45 N. Y. 129, 137; s. c., 6 Am. Rep. 52; *City of Chicago v. Powers*, *supra*; *Thornton v. Campton*, 18 N. H. 20; *Monaghan v. School District, etc.*, 38 Wis. 101; *Erd v. City of St. Paul*, 22 Minn. 443.

[Minor consideration on another point omitted.]

Judgment reversed.

Petition for rehearing overruled.

KEALING V. VANSICKLE.

(74 Ind. 529.)

Negotiable instrument — evidence to vary apparent contract of indorser before utterance.

Although the presumptive liability of one who writes his name on the back of negotiable paper before the payee is that of an indorser, not liable to the payee, yet parol evidence is competent to show that the contemporaneous and mutual intention was that he should be held as maker or surety.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below,

F. M. Finch and *J. A. Finch*, for appellants.

L. D. McClain and *A. F. Denney*, for appellee.

* To same effect, *Owings v. Baker*, *post*. See *Stack v. Beach*, *post*; *Carpenter v. McLaughlin* (12 R. I. 270), 34 Am. Rep. 638.

WOODS, J. The error assigned is that the court at General Term erred in reversing the judgment at Special Term.

The suit was brought by the appellee against the appellants and James A. Kealing, upon a promissory note made by said James to the appellee, whereby one year after date of August 4, 1875, said James promised to pay to the order of the appellee \$750, value received, payable at Fletcher & Sharpe's bank, at Indianapolis, without any relief from valuation or appraisal laws, with ten per cent interest. The appellants indorsed their names on this note before its delivery to the payee. The complaint is in several paragraphs and seeks in one to charge the appellants as sureties for the maker, in another as guarantors, and in another as indorsers. The court by request made a special finding, and stated its conclusions of law thereon as follows:

“That on the 4th day of August, A. D. 1875, the said defendant, James A. Kealing, delivered to the plaintiff, Vansickle, a promissory note for the sum of \$750, payable twelve months after date, with ten per cent interest; that said note was commercial paper payable in bank, and had the name of the defendant James A. Kealing signed at the bottom, and the names of the defendants, Samuel Kealing and John Kealing, signed on the back thereof; that upon said note thus signed the plaintiff loaned said James A. Kealing the sum of \$750, of which said Samuel and John received no part, having signed said note for the accommodation of said James A. Kealing; that the plaintiff did not see said defendants Samuel and John sign said note, nor have any conversation with them, or either of them, until after the maturity of said note, and but a short time prior to the commencement of this action; that said note was not protested at maturity, nor other notice of non-payment thereof given to the defendants Samuel and John; that no part of the principal or interest of said note has been paid; that long after the maturity of the note, and a short time before the commencement of this action, in two different conversations, Samuel and John Kealing stated that they were security for their brother James upon said note; that in a separate conversation since this suit was commenced, the defendant John stated that he was security for James upon said note; that a short time prior to the commencement of this suit, both Samuel and John offered to become security for James A. upon a new note running eighteen months, which the plaintiff declined to accept.”

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And as matters of law the court finds : “ That said Samuel and John Kealing are *prima facie* indorsers upon said note, and James A. Kealing is the maker ; that said Samuel and John indorsed said note before the same was delivered to the payee ; that said note has not been negotiated, but is still owned by the payee ; that the proof does not show that Samuel Kealing and John Kealing, by their indorsement of said note, intended to bind themselves as sureties ; or in any other or different character than as indorsers ; that by the neglect of the plaintiff to notify said Samuel and John of the non-payment of said note at maturity, they were discharged from liability thereon ; that said Samuel and John have not, by any new promise or admission, waived their rights to insist upon such discharge from liability in this action ; that the plaintiff is entitled to judgment for the full amount due on the note against James A. Kealing, and said Samuel and John are entitled to judgment for costs.”

To each of these conclusions the plaintiff excepted, and filed motions for a *venire de novo*, and for a new trial, and reserved exceptions to the overruling thereof.

The court, at Special Term, gave judgment according to the conclusions of law as stated, but this judgment the court at General Term reversed as to said Samuel and John Kealing, and ordered judgment against them for the full amount due on the note. In explanation of the theory on which the court reached its conclusion, from which one of the judges dissented, we make the following extract from the opinion of the majority of the court : “ It is apparent then, that *prima facie* John and Samuel Kealing were indorsers on the note sued on, and it is also true that this presumption may be removed by parol evidence to the contrary. Do the facts as found by the court establish the relation of these defendants to be sureties rather than indorsers ? In our opinion they do. On the one hand is the presumption of the law, unsupported by any circumstance or fact, while on the other is the affirmative evidence of their admissions, that they signed as security for their brother, and for his accommodation alone. The term ‘ security ’ is synonymus with ‘ surety. ’ * * * In *Sill v. Leslie*, 16 Ind. 236 (see also, *Robison v. Lyle*, 10 Barb. 512), the presumption * * * of the liability of an indorser, and nothing more, was held to be overcome by evidence that the presumed indorser had, in

a conversation with the plaintiff, and in response to a question by him, if he did not sign the note, replied : ' Yes, he signed as surety.'

" We are of opinion therefore upon the facts as found by the court, that the defendants John and Samuel Kealing assumed the relation of sureties on the note in suit, and as such were not entitled to notice of non-payment thereof, but are liable jointly with their principal, James A. Kealing."

We do not dissent from the proposition of law advanced by the Superior Court in reference to the *prima facie* liability of the indorser in such cases being controllable by proof that a different liability was intended (*Browning v. Merritt*, 61 Ind. 425) ; but we think that a proper analysis of the facts found will not warrant the conclusion reached, that a different liability was intended by the parties in this case.

In the first place it is a mistake to say that, " on the one hand is the presumption of law, unsupported by any circumstance or fact." It is found expressly that the plaintiff did not see said defendants Samuel and John sign said note, nor have any conversation with them, or either of them, until after the maturity of the note, and but a short time before the commencement of this action; and as it is the office of a special finding to state what was proven (*Ex parte Walls*, 73 Ind. 95), it is impliedly found that no communication passed between the parties, showing that said defendants intended to incur, or that the plaintiff intended to accept from them, any other liability than what was apparent from the paper itself.

The character of the contract in question became fixed at the moment of its complete execution, that is, upon its delivery to the plaintiff, and nothing done or said by either party at a subsequent time could change that character, though it might be used as evidence on the subject. Whether the contract was one of indorsement or suretyship, depended not on the intent of one of the parties, but on the mutual understanding and intent of both. This kind of contract is not an exception to the rule which requires the consent of both parties; and unless therefore it is made apparent from the facts found that both the plaintiff and said defendants Samuel and John intended that their liability should be that of suretyship, the conclusive legal presumption is that they all intended a contract of indorsement. The paper as delivered evidences that contract, and in the absence of evidence of a different mutual understanding, must from necessity be deemed controlling. Now it certainly can-

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not be inferred as a legal conclusion, from the facts found, that there was a mutual understanding between the parties at the time the note was delivered to the plaintiff and he advanced his money thereon, that the indorsers should be bound by any other contract than that evidenced by the note and indorsements as delivered.

Suppose that instead of being as it is, the note had contained a clause waiving presentment for payment, protest, and notice thereof, and that the plaintiff was seeking to hold them as indorsers, could it be successfully asserted that on the facts as found (with the exception supposed) said defendants were not indorsers, but sureties only?

Sill v. Leslie, cited *supra*, does not go to the extent claimed for it. The note in that case was executed in the same form as the note in this case, but the complaint in a single count charged all the defendants as makers. The verdict was general, not special, and on the evidence stated this court refused to disturb the verdict for the plaintiff. This is by no means equivalent to saying, as matter of law, that such a declaration of one of the parties overcomes the legal presumption arising from the form of the contract. In that case the complaint, which declared on the contract as one of suretyship only, may have been deemed to manifest the plaintiff's understanding that such was the contract, and the defendant having so declared his understanding, there was evidence on which the jury may well have inferred that the parties mutually so understood the contract when it was made. Indeed as a question of evidence arising upon an appeal, the declaration of the defendant, as proven in that case, was in itself, without reference to the complaint, sufficient to sustain the verdict; but this is quite different from saying, as matter of law, that it was sufficient to require the verdict which was found. In the case at bar there is no finding, nor anything in the pleadings, from which it can with any certainty be inferred that the plaintiff regarded the liability of said defendants as any thing else than that of indorsers. The complaint charges them in the three capacities of indorsers, sureties and guarantors, and furnishes no ground for an inference of the plaintiff's original understanding and intention; and as already stated, having received the paper, without notice that the indorsers intended any thing else than indorsement, the only reasonable, if not the conclusive, presumption would seem to be that he accepted the paper, intending to hold them as indorsers only. This however is a question of

evidence, to be determined by the court or jury which shall try the case, according to the proof made.

Aside from these considerations, the order of the court in General Term, that judgment be given on the special finding for the plaintiff against said Samuel and John, for the full amount of said note, was erroneous.

The special finding and the conclusions of law thereon are not properly constructed. The finding in part does not find the fact, but only evidence thereof and the conclusions of law as stated are not matters of law entirely, but in part are matters of fact which should have been found as such. In so far as the finding shows that the plaintiff did not see said Samuel and John sign the note, and had no conversation with them until after the maturity thereof, and that said defendants stated in two conversations that they were security for their brother on said note, it is a finding, not of fact in any proper sense, but only of items of evidence which tend to show the fact which ought to have been found as such, namely, the capacity in which the parties mutually intended that Samuel and John should be bound. There was no harm in, though no necessity for, stating these items of evidence in the finding, but without stating the conclusion of the court in reference to the ultimate fact which was in issue, according as the court deemed the evidence to preponderate, the finding was imperfect.

The court did find, "as matter of law," that said Samuel and John Kealing are *prima facie* indorsers upon said note, and that the proof does not show that by their indorsement they intended to bind themselves as sureties or in any other or different character than as indorsers; but their intention in this respect, as well as the intention of the plaintiff, was matter of fact which should have been found as such. It is plain that the finding of it as matter of law is not the equivalent of a finding of the fact as such.

On account of these defects in the finding and in the statement of legal conclusions, instead of ordering judgment for the plaintiff as against said Samuel and John, the order should have been that the motion for *venire de novo* be granted as to said defendants.

The judgment is therefore reversed with costs, and with instructions to grant the motion for a *venire de novo* as to the said defendants Samuel and John Kealing.

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ON PETITION FOR A REHEARING.

WOODS, J. A rehearing is asked on the ground that the fact stated in the finding, that John and Samuel Kealing indorsed the note before its delivery to the payee for the accommodation of James A. Kealing, who alone received of the payee the consideration of the note, is equivalent to a finding that said John and Samuel intended to become and were accepted by the payee as original makers, liable jointly with or as sureties for said James.

After a careful and painstaking examination of the decisions throughout the United States and a study of such English cases as they could find, the counsel for the appellee deduce the following rule in reference to the liability of indorsers who sign before an indorsement of the paper by the payee: "Where oral evidence is at all admissible to show the character of the liability of such indorsers, and where the indorsement was made solely to give credit to the maker with the payee, and for the accommodation of the maker, the indorser is regarded holden and bound as a surety for the maker;" and concluding the discussion, the counsel add: "In this case it is utterly indifferent to us whether the rule of *prima facie* liability be that of makers or that of indorsers. The vital principle is, that when the indorsement is made with the intention to give the maker credit with the payee, then the liability of the indorser is that of a surety for the maker. And this liability is clearly shown by the special finding here."

The cases cited, and which might be cited on this subject, are numerous, and if not full of confusion and contradiction, are in many respects variant and difficult to harmonize. We shall not attempt the task. See *Chaddock v. Vanness*, 35 N. J. 517; s. c., 10 Am. Rep. 256; *Vore v. Hurst*, 13 Ind. 551; 1 Dan. Neg. Inst. 709-716, and notes. The following are the latest cases, besides our own, cited by counsel: *Jaffray v. Brown*, 74 N. Y. 393; *Coulter v. Richmond*, 59 N. Y. 478; *Fear v. Dunlap*, 1 Greene (Iowa), 331; *Billingham v. Bryan*, 10 Iowa, 317; *Arnold v. Bryant*, 8 Bush, 668; *Jones v. Goodwin*, 39 Cal. 493; s. c., 2 Am. Rep. 473; *Ford v. Hendricks*, 34 Cal. 673; *Eilbert v. Finkbeiner*, 68 Penn. St. 243; s. c., 8 Am. Rep. 176; *Collins v. Everett*, 4 Ga. 266; *Cogswell v. Hayden*, 5 Oreg. 22; *Milton v. De Yampert*, 3 Ala. 648; *Jennings v. Thomas*, 13 Sm. & Marsh. 617, showing the *prima facie* liability to be that of an indorser; but the following showing it to be *prima facie* the liability of maker or guarantor: *Killian v.*

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Ashley, 24 Ark. 511; *Good v. Martin*, 2 Col. 218; *Clark v. Merriam*, 25 Conn. 576; *Gilpin v. Marley*, 4 Houst. 284; *Parkhurst v. Vail*, 73 Ill. 343; *Fuller v. Scott*, 8 Kan. 25; *McGuire v. Bosworth*, 1 La. Ann. 248; *Woodman v. Boothby*, 66 Me. 389; *Ives v. Bosley*, 35 Md. 262; s. c., 6 Am. Rep. 411; *Way v. Butterworth*, 108 Mass. 509; *Rothschild v. Grix*, 31 Mich. 150; s. c., 18 Am. Rep. 171; *Stein v. Passmore*, 25 Minn. 256; *Western, etc., Association v. Wolff*, 45 Mo. 104; *Barker v. Robinson*, 63 N. C. 191; *Seymour v. Mickey*, 15 Ohio St. 515; *Perkins v. Borstow*, 6 R. I. 505; *Carpenter v. Oaks*, 10 Rich. 17; *Harrison v. Sheirburn*, 36 Tex. 73; *Orrick v. Colston*, 7 Gratt. 189; *Burlon v. Hansford*, 10 W. Va. 470; s. c., 27 Am. Rep. 571; *Sylvester v. Downer*, 20 Vt. 355; *Gorman v. Ketchum*, 33 Wis. 427; *McGee v. Connor*, 1 Utah, 92; *Rey v. Simpson*, 22 How. 341; *Good v. Martin*, 95 U. S. 90; *Matthews v. Bloxsome* (Q. B.) 10 L. T. Rep. (N. S.) 415.

It is well settled in this State that the *prima facie* liability is that of indorsement. *Wells v. Jackson*, 6 Blackf. 40; *Early v. Foster*, 7 id. 35; *Harris v. Pierce*, 6 Ind. 162; *Cecil v. Mix*, id. 478; *Vorc v. Hurst*, 13 id. 551; *Sill v. Leslie*, 16 id. 236; *Snyder v. Oatman*, id. 265; *Drake v. Markle*, 21 id. 433; *Dale v. Moffitt*, 22 id. 113; *Houston v. Bruner*, 39 id. 376; *Roberts v. Masters*, 40 id. 461; *Bronson v. Alexander*, 48 id. 244; *Schulz v. Klenk*, 49 id. 212; *Nurre v. Chittenden*, 56 id. 462; *Browning v. Merritt*, 61 id. 425.

The doctrine as deduced from a consideration of the Massachusetts, New York and new English cases, was stated in *Wells v. Jackson*, *supra*, in the following language: "That the blank indorsement of unnegotiable paper, made at the date of the contract, and unexplained by extrinsic testimony, confers upon the payee the authority to hold the indorser liable on the original contract, as a surety; and that a similar unexplained indorsement of negotiable paper renders the indorser liable only as indorser, with the original rights and privileges incident to that character. But that in either case the liability designed to be assumed, and the authority intended to be given by the indorsement, may be explained by the attendant circumstances, and the *prima facie* responsibility be changed into one of another kind. And this appears to us to be also the common-sense view of the subject."

This statement of the doctrine has been sometimes quoted and repeatedly recognized, and never condemned or criticised, in the

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other cases; but whether it has been uniformly understood and applied in the sense in which it was understood and applied in the case where it is found, is not clear. As stated, the rule is made ambiguous, or at least capable of two constructions, by reason of a change of the form of the expression in the two clauses of the first sentence. In the first clause it reads, "confers on the payee the authority to hold the indorser liable on the original contract as a surety;" but instead of continuing the same form of expression in the second clause and saying, "authorizes the payee to hold," etc., it says, "renders the indorser liable only as indorser."

Just here seems to be the pivotal point of the discussion. The position taken by the counsel for the appellee is, and the cases which support it assume, that such an indorser cannot be liable as an indorser to the payee of the paper. This of course implies the farther assumption of the corollary proposition that such an indorser, if liable to the payee at all, must be liable as a joint maker, surety, or guarantor; any thing but indorser. This much assumed, the conclusion is easy and logical that a finding, which shows that the indorsement was made in order to give the maker credit with the payee, is equivalent to a finding that the indorser intended to become liable to the payee; and as his liability cannot be that of indorsement, it is either suretyship or guaranty. In this case we are asked to call it suretyship rather than guaranty, because it was held, in *Drake v. Markle*, *supra*, that the statute of frauds forbids parol proof in such a case of an intended guaranty. But the effect of this ruling if upheld, as we conceive, must be not that the indorser who may have intended to assume the liability of a guarantor will be held as a surety instead, but rather that the actual intention being nullified by force of the statute the parties will be remitted to the presumptive *prima facie* obligation of indorsement.

We might stop here therefore, and upon his own theory hold the appellee not entitled to a judgment in his favor upon the finding made, because it does not appear whether the indorsers intended to accommodate the maker and give him credit with the payee as sureties, or as guarantors. If as guarantors, aside from the statute of frauds, they are not liable except upon proof of a demand on the maker, and notice of non-payment within a reasonable time after the default, or proof that no harm had, or reasonably could have accrued to them on account of the failure to make the demand and give them notice thereof. *Gaff v. Sims*, 45 Ind. 262; *Cole v. Merchants' Bank*, 60 id. 350; 2 Dan. Neg. Inst. 662, § 1787.

We prefer however not to rest our decision here. We think the assumption that an indorser may not be liable as such to the payee of a note, however seemingly well supported by the authority of decided cases, is not in accordance with sound reason, with "the common-sense view of the subject," nor with the drift or status of the decisions of this court, especially of the later cases. What is there in the terms or in the nature of the obligation of the contract of indorsement, which forbids its operation in favor of the payee of a note as well as in favor of an indorsee in the strict sense? A regular "indorsement, when made for an adequate consideration, passes the interest of the indorser, and amounts to an undertaking, unless qualified in express terms, that if the bill or note is not paid at maturity, and the indorser has due notice of dishonor, he will pay it, which in law is a contract in favor of the indorsee and every holder to whom the note or bill is transferred." Chitty Bills, 241; Story Notes, § 135; Edwards Bills, 272-284; *Chaddock v. Vanness*, *supra*. The indorsement of one who signs before indorsement by or delivery to the payee, of course makes no transfer of interest or title in the note, but there is no reason why it may not evidence an undertaking by the indorser to the payee or holder that if the note is not paid by the maker, and the indorser has due notice of the dishonor, he will pay it to the payee as well as to his indorsee. There can be no doubt, that if written out in full over the indorsed name, such a contract would be in all respects valid and effective, and the liability would be exactly the same as that of an indorser; and it being established that parol evidence is admissible to show what contract the parties intended, it should be admissible to show this as well as a contract of suretyship or of guaranty. The primary presumption, let it be granted, is a strict indorsement which will not operate in favor of the payee, but of his indorsee only, such indorser being liable only as second indorser and entitled to recourse against both the maker and the payee who becomes the first indorser; but if the evidence show that the indorsement was made before delivery to the payee, and for the maker's accommodation or to give him credit with the payee, then the indorser is liable directly to the payee, *prima facie*, as indorser, or if the proof be such as to show it, then as surety.

That such indorser may be liable to the payee as indorser counsel concede to be the ruling in Alabama and Mississippi. *Milton v. De-Yampert*, 3 Ala. 648, and *Jennings v. Thomas*, 13 Sm. & M. 617.

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To the same effect, as we understand them, are the decisions in California, where such an indorser is called a guarantor, but his liability, which is enforced in favor of the payee, is held to be the same as that of indorser. *Clarke v. Smith*, 2 Cal. 605; *Ford v. Hendricks*, 34 id. 673; *Jones v. Goodwin*, 39 id. 493. Besides the quotation already given, the following language is used in *Wells v. Jackson*, *supra*, to wit: "The defendant is the last of three indorsers and must be presumed, agreeably to the principles laid down, to have placed his name upon the bond in the character of an ordinary indorser looking to the responsibility of those whose names precede his, including the payee and maker. As the count under consideration attempts to hold the defendant primarily liable it is defective." This decides that the *prima facie* obligation in such case is as second indorser, but it is not a decision even by implication that there may not be a liability as indorser in favor of the payee. In *Early v. Foster*, 7 Blackf. 36, in an opinion prepared by the same judge who wrote the opinion in *Wells v. Jackson*, after saying that the "unexplained indorsement of the note made at this date did not render" the indorser primarily liable as a joint maker to the payee, the court add: "And he is not shown to be responsible as an indorser, so as to render him jointly liable with the maker under the statute," strongly intimating, if not absolutely implying, an understanding on the part of the court, that he was liable to the payee as indorser, though not shown to be liable jointly with the maker under the statute. The same understanding is manifest in most of the decisions made by this court since that time, while the cases of *Bronson v. Alexander*, 48 Ind. 244, and *Nurre v. Chittenden*, 56 id. 462, are totally irreconcilable with the position that such an indorsement, made before delivery and for the accommodation of the principal obligor, is an original undertaking or contract of suretyship, but on the contrary they are in entire harmony with and indeed can be upheld only upon the doctrine that the indorser may be liable as such to the payee, and if liability to the payee be shown to have been intended, it will be presumed to be as indorser, unless the evidence shows affirmatively that a different contract was intended.

In accord with these views we subjoin the following quotations from Mr. Daniel's work on Negotiable Instruments already cited. He says: "Sec. 710. * * Whatever diversities of interpretation may be found in the authorities on the subject they very generally

concur, though not with entire unanimity, that as between the immediate parties, the interpretation ought to be, in every case, such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstance which took place at the time of the transaction. If the person who places his name on the back of the note before the payee intended at the time to be bound to the payee only as a guarantor of the maker, he shall not be deemed to be a joint promisor, or an absolute promisor to the payee. If he intended to bind himself as a surety or joint maker of the note, he will not be permitted to claim afterward that he was only a guarantor. And if he intended to be bound only as an indorser, the better opinion is that this also may be shown as between him and the payee.

“Sec. 714. It would seem to us that such a party ought to be regarded as a first indorser. If he intended to be a second indorser, he should have refrained from putting his name on the note until it was first indorsed by the payee. By placing it first he enables the payee to place his own afterward; and *prima facie* the facts would seem to indicate such intention. There is nothing in the objection that there is no title in him to indorse away. Prior parties could not be sued without the payee's indorsement; but he being an indorser can be sued by any one deriving title under him. In fact, his position seems to render his liability strictly analogous to that of the drawer of a bill upon the maker in favor of the payee; and so to regard him simplifies, as it seems to us, a question which, unless such analogy be followed, is exceedingly complicated and difficult. * * *

“Sec. 715. What parol evidence determines the liability of the person signing before the payee is also a matter upon which opinion is diverse. Many authorities take the ground that when it appears that the note was intended for the payee, or that the name was placed upon the back of the note before its delivery to the payee, that circumstance fixes the liability contracted as that of joint maker, and excludes further inquiry. But this does not seem to us sufficient,” etc.

“Sec. 716. When the note is sued upon by the payee, it is held that the idea of the party before him being bound as an indorser is excluded. But this doctrine does not seem to us correct. The indorsement, it is true, is an irregular one; but it is quite similar to a bill drawn by the indorser on the maker, and to follow that analogy

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in all regards seems to us the simplest and most reasonable solution of the question. And there are a number of cases which regard such a party's liability as *prima facie* that of an indorser." The cases cited under the last proposition are: *Price v. Lavender*, 38 Ala. 389; *Comparree v. Brockway*, 11 Humph. 355; *Clouston v. Barbieri*, 4 Sneed, 335; *Jennings v. Thomas*, 13 Sm. & M. 617; *Kamm v. Holland*, 2 Oreg. 59; and the following of this court already cited *supra*; *Wells v. Jackson*; *Vore v. Hurst*; *Sill v. Leslie*; *Dale v. Moffitt*; *Roberts v. Masters*.

The petition is overruled, with costs.

ELLIOTT, J., absent.

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(74 Ind. 571.)

Negotiable instruments — evidence to vary liability of regular indorser.

Parol evidence is inadmissible to vary the apparent liability of one writing his name on the back of a promissory note after the payee, by showing that the indorsement was made simply for the purpose of identifying the payee. (See note, p. 116.)

ACTION on a bill of exchange. The opinion states the case. The plaintiff had judgment below.

A. B. Carlton and J. E. Lamb, for appellant.

J. G. Williams and B. V. Marshall, for appellee.

ELLIOTT, J. Appellant was sued as the indorser of a bill of exchange. The answer is in two paragraphs. This appeal presents the question of the sufficiency of the second of these paragraphs, to which the trial court sustained a demurrer.

The material statements of the answer are in substance these: That the appellant went with one John W. Wilson, to the Prairie City Bank, of Terre Haute, for the purpose of identifying the said Wilson as the payee and holder of the bill of exchange sued on; that the agent of the bank requested appellant to write his name on the back thereof, for the purpose of identifying Wilson; that he, the appellant, never owned or had possession of said bill; that

he did not negotiate it; that he did not sign it as maker, surety or indorser; that the sole purpose for which he wrote his name on the back thereof was to identify the said Wilson as the payee of said bill; that Wilson was the identical person he represented himself to be; that appellant was not requested to write his name as indorser by Wilson or anybody else; that he was not informed, nor did he understand, that he was signing as an indorser.

The answer is insufficient. The contract of indorsement was a written one, and fully within the rule that parol evidence is not admissible for the purpose of modifying or contradicting written contracts. In *Prescott Bank v. Caverly*, 7 Gray, 217, evidence was offered to show that the indorser had only placed his name upon the back of the bill to identify the person to whom it was paid, and that it was agreed and understood that this was the sole purpose for which the signature was placed upon the note, but the evidence was excluded. There are in our own reports many cases holding that parol evidence is not admissible for the purpose of showing that an indorsement was without recourse. *Lee v. Pile*, 37 Ind. 107; *Campbell v. Robins*, 29 id. 271; *Willson v. Black*, 6 Blackf. 509; *Blair v. Williams*, 7 id. 132. In *Parker v. Morton*, 29 Ind. 89, it was held that an answer to an action upon the assignment of a promissory note, setting up a verbal contemporaneous agreement, was insufficient. There is some conflict in the decisions of other courts, but the weight of authority is with the holding of our court, that the indorsement is a written contract, and within the rules of evidence ordinarily applicable to such contracts. The cases which hold the contrary doctrine proceed upon the theory that the contract is implied by law, and is not set out in writing, but this doctrine cannot be reconciled with fundamental principles. The reason upon which rests the rule sanctioned by this and many other courts is thus well and accurately stated in *Woodward v. Foster*, 18 Gratt. 200: "When the legal import of a contract is clear and definite, the intention of the parties is for all substantial purposes as distinctly and as fully expressed as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words if the law attaches to what is expressed a clear and definite import. Though the writing consists only of a signature, as in the case of an indorsement in blank, yet where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by

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evidence of a contemporaneous parol agreement than if the whole contract had been fully written out in words. The mischiefs of admitting parol evidence would be the same in such cases as if the terms implied by law had been expressed."

There is an important exception to the general rule that an indorsement cannot be varied or contradicted by parol evidence. Parol evidence is admissible for the purpose of showing that the indorsement created a trust. Thus it may be shown that a principal indorsed to an agent for the purpose of allowing the latter to use the bill for some particular purpose. *Dale v. Gear*, 38 Conn. 15; s. c., 9 Am. Rep. 353; *Chaddock v. Vanness*, 35 N. J. 517; s. c., 10 Am. Rep. 256. So it has been held that the indorsement may be shown to have been for collection merely, and that the instrument was delivered as an escrow upon an express condition not performed. *Ricketts v. Pendleton*, 14 Md. 320; *McWhirt v. McKee*, 6 Kans. 412; *Wallis v. Littell*, 11 C. B. (N. S.) 369; *Bell v. Lord Ingestre*, 12 Q. B. 317. It is upon this general doctrine that the holding in *Hazzard v. Duke*, 64 Ind. 220, that it may be shown by parol evidence that the instrument was indorsed as collateral security, can be fully sustained. The principle that parol evidence is competent for the purpose of showing a trust is by no means confined to contracts of indorsements. Whart. Ev., § 903. A familiar illustration of this general doctrine is supplied by the numerous cases holding that a deed absolute on its face may be shown to be a mortgage. The cases which hold, that as between the parties who execute or indorse the bill the true relationship may be shown, do not trench upon the rule that an indorsement cannot be varied by parol evidence. The rights of such parties may be tried between themselves, but the rights of the holders cannot be thereby affected. *Houston v. Bruner*, 39 Ind. 376. Nor do those cases which hold that where the indorsement is made by a third person, prior to an indorsement by the payee, parol evidence is admissible to show the character of the indorser's undertaking, have any bearing upon the question here under discussion. The contract in such a case is unlike that of a full contract created by writing the name after the payee has regularly indorsed the instrument. The indorsement of a note or bill not previously indorsed or not indorsed at all by the payee is an irregular proceeding, and the contract created by it is not one of fixed and definite legal import. An indorsement regularly following that of the payee does consti-

tute a certain and defined contract, with a legal force and meaning quite as complete and certain as if all the conditions and stipulations of the contract had been written out at full length. This is substantially the doctrine declared in *Vore v. Hurst*, 13 Ind. 551, and which has been sanctioned by a long and unbroken line of decisions. *Armstrong v. Harshman*, 61 Ind. 52; *Hollon v. McCormick*, 45 id. 411; *Roberts v. Masters*, 40 id. 461; *Drake v. Markle*, 21 id. 433; *Dale v. Moffitt*, 22 id. 113; *McGaughey v. Elliott*, 18 id. 121. There are many adjudicated cases declaring and enforcing the principle upon which our cases are bottomed. Among them are *Brown v. Spofford*, 95 U. S. 474; *Specht v. Howard*, 16 Wall. 564; *Howe v. Merrill*, 5 Cush. 80; *Bigelow v. Colton*, 13 Gray, 309; *Wright v. Morse*, 9 id. 337; *Crocker v. Getchell*, 23 Me. 392; *Tankersley v. Graham*, 8 Ala. 247.

It affirmatively appears from the complaint and answer that the appellant's indorsement follows that of the payee, and the case is therefore brought fully within the rule which has so long prevailed in this State.

The answer contains a general statement that the appellant did not indorse the note, but this is a mere conclusion of the pleader from the facts stated, and does not of itself make the answer sufficient. A bare general statement thrown into the body of a pleading, setting forth specific facts, will not be allowed to control the pleading and make good what would otherwise have been bad. The substantive traversable facts are to be looked to in determining the sufficiency of a pleading and not mere conclusions. *Neidefer v. Chastain*, 71 Ind. 363. It would violate all rules of good pleading to permit a pleader to make good a pleading, by casting into it, in some out of the way place, a general statement entirely variant from and inconsistent with the facts stated as constituting the cause of action or defense.

Judgment affirmed.

NOTE BY THE REPORTER.—To same effect *Taylor v. French*, 2 Lea, 257; s. c., 31 Am. Rep. 609; *contra*, *Rodney v. Wilson*, 67 Mo. 123; s. c., 29 Am. Rep. 499. See *Kcaliny v. Van Stickle*, *ante*; *Owings v. Baker*, *post*; *Breneman v. Furniss*, 90 Penn. St. 186; s. c., 33 Am. Rep. 651.

In *Martin v. Cole*, United States Supreme Court, October 1881, it was held that it is not competent in an action against an indorser by his immediate indorsee upon an indorsement made in blank, of a negotiable promissory note, to prove as a defense that as part of the transaction it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse. The court, by MATHEWS, J., said:

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"The agreement set out and relied on in the plea was that 'the said indorsement should never be filled up so as to make this defendant liable in any manner upon the said indorsement, but only to enable the said plaintiff to sue the said note in his own name, if suit thereon should become necessary.' And the defendant averred that 'he, relying upon the assurance of the said plaintiff, that his indorsement would not be filled up so as to render him liable as indorser thereon, signed his name upon the back of said note, which without said assurance he would not have done.' As the indorsement in blank admitted by the defendant to have been made by him, without being filled up by the plaintiff at all, rendered him liable for the payment of the note as an indorser, the breach by the plaintiff of the alleged agreement was inconsequential and could not in law result in any actionable injury; for filling up the blank indorsement in the manner in which it was done neither added to nor subtracted from the liability which the defendant assumed by merely writing his name on the back of the note.

"The defendant below however further offered at the trial to prove that at the time the note was transferred by Martin to Cole, it was expressly agreed between them that Martin should indorse his name on the note in blank, to enable Cole to collect it in his own name, and that Cole agreed then, in consideration of what he had given for the note, that he (Martin) was never to be called upon as indorser or guarantor of its payment in the event he failed to collect it from the maker of the note. No question was made at the time, nor has been raised since, as to the admissibility of such proof, under a plea of the general issue; and waiving any objection on that account, the rejection by the court below of this offer fairly raises the issue intended to have been made by the special plea, whether it is competent, in an action against an indorser by his immediate indorsee, upon an indorsement made in blank of a negotiable promissory note, to prove as a defense that as part of the transaction it was agreed between the parties, but not in writing, that it should merely have the legal effect of an indorsement expressed to be without recourse.

"It has never been contended that such a defense, based on dealings between prior parties, could be maintained to defeat the title of a *bona fide* holder for value of negotiable paper, acquired before maturity, in the usual course of business, and without notice; for the protection of such a title is the essence of the policy of the law-merchant, and inheres in the very definition of negotiability. Hence in that case a collateral but contemporaneous written agreement, between two prior parties to a bill or note, would not affect its validity in the hands of the holder, more than if the agreement were unwritten. Whereas, between the immediate parties, if the agreement relied on were in writing, its terms would fix and determine their rights and obligations, as was decided by this court in *Davis v. Brown*, 94 U. S. 427. The question is between them alone; and is, whether the same effect will be given to such an agreement not reduced to writing.

"The ground of decision must be found in some other principle or policy of the law than that which protects the title of a remote innocent holder of negotiable paper.

"Accordingly Mr. Justice WASHINGTON, in the case of *Susquehanna Bridge and Bank Co. v. Evans*, 4 Wash. C. C. 480, after admitting proof of such an agreement, in an action by the holder of a promissory note against his immediate indorser, said in his charge to the jury:

"The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments, do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the indorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was therefore properly admitted.

"It is upon this distinction between contracts, express and implied, that those judicial tribunals have proceeded, in which such proof is held to be admissible. It is declared, for example, by the Supreme Court of Pennsylvania, in the case of *Ross v. Espy*, 66 Penn. St. 488; 5 Am. Rep. 394, that 'the contract of indorsement is one implied by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an express agreement.'

"So in an early case in New Jersey, *Johnson v. Martinus* (4 Halst. 144), 17 Am. Dec. 464, it was held by the Supreme Court of that State that parol evidence was competent

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to overcome the implied contract which results from a blank indorsement on the ground that such indorsement is an inchoate or imperfect contract and not a written instrument, nor entitled to its effect, protection or immunity.

"This case however was expressly overruled by the same court in the case of *Chaddock v. Vanness*, 35 N. J. 517; s. c., 10 Am. Rep. 256, in which it is plainly indicated that the distinction attempted to be made, in some of the cases, between indorsements in full and those which are in blank, is untenable

"The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not, in any proper sense, a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less, on that account, perfectly understood. All its terms are certain, fixed and definite, and when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full.

"It is spoken of by Wharton (Law of Evidence, § 1059) as a contract *at short-hand*. The same view is taken in Daniels on Negotiable Instruments, § 718, where the author states, as a resulting conclusion that embodies the true principle applicable to the subject, that 'In an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer, against him.' If the commercial contract of indorsement is treated as a contract in writing, this conclusion is undoubtedly correct. If it is not, we have the anomaly of applying one rule between maker and payee, and a different one between payee becoming indorser and his immediate indorsee, without any difference to justify it in the relation of the parties to each other in the two cases.

"The rule is tersely stated in Benjamin Chalmers' Digest of the Law of Bills of Exchange, etc., art. 56, p. 63: 'The contracts on a bill, as interpreted by the law-merchant, are contracts in writing. Extrinsic evidence is not admissible to contradict or vary their effect.' Citing *Abray v. Cruz*, L. R., 5 C. P. 37.

"The rule as declared by Mr. Justice Washington in the case cited, was expressly rejected by this court in the case of *Bank of United States v. Dunn*, 6 Pet. 51, one distinct ground of its opinion being that parol evidence is not admissible to vary a written agreement, citing the language of the court in *Renner v. Bank of Columbia*, 9 Wheat. 587: 'For there is no rule of law better settled or more salutary in its application to contracts than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement.'

"The authority of this case on this point has never been questioned in this court, the explanation and qualification in *Davis v. Brown*, 94 U. S. 423, having reference only to the rule as to the competency of an indorser as a witness to impeach the validity of a negotiable instrument to which he is a party. In the case last referred to, the agreement relied on to qualify the instrument was admitted because it was in writing and part of the transaction.

"The case of *Bank of the United States v. Dunn*, *supra*, is cited as an authority upon the point in *Phillips v. Preston*, 5 How. 291, 'because, in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports.'

"It is also referred to in terms and followed in the case of *Brown v. Wiley*, 20 How. 442. In delivering the opinion of the court in that case, Mr. Justice GRIER used this language: 'When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our States, originating in hard cases, but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity

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arising in this case which needs explanation. By the face of the bill the owner of it had a right to demand acceptance immediately, and to protest it for non-acceptance. The proof of a parol contract, that it should not be presented till a distant, uncertain or undefined period, tended to alter and vary, in a very material degree, its operation and effect. See *Thompson v. Ketcham*, (8 Johns 192), 5 Am. Dec. 332.'

"The action in this case, it is true, was between the payee and drawer, upon a bill of exchange; but the obligation on which it was founded, that the drawer would pay, in the event of non-acceptance by the drawee, notice of dishonor and protest, is one not actually expressed in terms in the bill itself, but imported by construction of law, as constituting the operation and effect of the contract.

"In the case of *Specht v. Howard*, 16 Wall. 564, Mr. Justice SWAYNE, delivering the opinion of the court, quotes from Parsons on Notes and Bills, 591, that 'it is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, or contradict, to add to or subtract from the absolute terms of the written contract.'

"The same quotation forms part of the opinion in the case of *Forsythe v. Kimball*, 91 U. S. 291, with the addition that in the absence of fraud, accident, or mistake, the rule is the same in equity as at law.

"The same principle upon the authority of these cases was affirmed by this court in *Brown v. Spofford*, 95 U. S. 474, and is assumed to be the law in *Cox v. National Bank*, 100 Id. 713, and *Brent's Exrs. v. Bank of Metropolis*, 1 Pet. 89.

"In view of this line of decisions, the question as it arises in this case cannot now be considered an open one in this court. It coincides with the rule adopted and applied in most of the States, but the cases are too numerous for citation. They will be found collected however in Bigelow's Bills and Notes, 168; Byles on Bills, (6th Am. ed.) Sharswood's note, 157; 1 Daniel on Neg. Inst., §§ 80, 717, *et seq.*; 2 Wharton on Ev., § 1058, *et seq.*; Benjamin's Chalmers' Dig. Bills of Exch., art. 56, p. 63.

"Of course there are many distinctions, which upon the circumstances of cases, determine the applicability of the rule, and classes of cases which form apparent exceptions to it. It is not necessary to refer to them here, further than to say that the limitations of the rule are perfectly consistent with it, and its application in this as in other proper cases will not be considered as encroaching upon them."

In *Johnson v. Ramsey*, 43 N. J. 451, the opinion is as follows: "This case presents for consideration, in one of its aspects, the question how far the written contract inherent in the indorsement of commercial paper, as between accommodation indorsers, can be controlled or affected by a contemporaneous oral agreement. The plaintiff in the present suit is the first indorser on this note, and has paid part of the sum mentioned in it, and he now seeks to compel the defendant, who is the next indorser below him, to contribute one-half of this outlay, on the ground that at the time they signed the paper such was the understanding between them. As they stand upon the note these are successive indorsements, and unexplained, and considered intrinsically they import a primary liability in the plaintiff; and with respect to him an entire irresponsibility on the part of the defendant. This is the legal effect of the signatures as they appear on the back of the note; the inquiry is whether another force can be given to them by virtue of an agreement between these parties, entered into at the time of making such indorsements.

"In defining the legal rule on this general subject, Mr. Byles, in his treatise on Bills, page 90, correctly say, that 'no mere oral agreement can have any effect at law in contradicting the instrument, if contemporaneous with the making of it.' This is the ordinary principle applicable to every species of written contracts; and although in the main it throws its protection around the agreement embodied in commercial paper, still it cannot be denied that in this latter case it has sometimes been thought to be subject to certain unusual limitations. That such supposed limitations have the sanction of high judicial authority I think is manifest, though these exceptions to the general rule are not so numerous as is sometimes supposed. I have not perceived that in any English cases a different rule in this respect has been applied to commercial paper from that which protects the inviolability of other species of written undertakings. And such, too, is the

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general bent of the authorities in this country. Nevertheless, no one can look into the American decisions and text-books without being painfully impressed with the idea that very great confusion in the use of principles prevails with regard to this topic ; but upon careful examination it will be found that this state of things is for the most part owing to mistake in the application of the law to particular facts, and not to any denial of the cardinal doctrine that these written commercial contracts, like other proofs of the same nature, are not liable to modification by inconsistent, contemporaneous, oral understandings. Occasionally a case can be met with in which it may be thought, and upon very satisfactory grounds, that the written contract has been altered by the extraneous evidence, but upon careful scrutiny it will be ascertained that such evidence has been sanctioned for the reason that in the judgment of the court it is not out of harmony with the agreement, as contained in the instrument. So sometimes cases, in which a want of consideration has been permitted to be shown, have been regarded as exhibitions of instances of a departure from the rule in question, but it is plain that they do not evidence such a deviation, as the proof of such a defect is always, under ordinary circumstances, admissible in order to invalidate a simple contract, though reduced to writing. In the same manner fraud and illegality are legitimate defenses to suits on all other instruments, as well as under certain conditions to those founded on bills or notes. And when the commercial contract intended to be committed to writing has been only partly expressed, then as in other similar cases the residue may be proved by extrinsic evidence. This last rule is pointedly exemplified in that class of cases in which a note has been indorsed in blank by a third party, before the payee has put his name upon it. In the courts of this State such an indorsement is held to carry with it so incomplete and uncertain a meaning as to be, on the principle just referred to, open to the explanation of oral evidence. This has been ruled and finally decided in the cases of *Crozer v. Moore*, Spence 266 ; *Watkins v. Kirkpatrick*, 2 Dutcher, 84, and *Chaddock v. Vanness*, 6 Vroom, 517 ; s. c , 10 Am. Rep. 256 ; and in all these cases the fundamental rule that a written contract, having a complete import, must speak exclusively for itself, was fully admitted. And even in those States in which, under the same conditions, a different result has been reached — and such has been the case in the State of New York and elsewhere — such result has rested on the consideration that this particular kind of indorsement expresses in its own terms, as affected by legal rules, a contract complete and intelligible, and on that account is not variable by the force of foreign testimony. It will be observed that neither of these lines of decisions is invasive of the rule under consideration. And it may be further remarked that in no jurisdiction has the rule, that oral evidence is inadmissible thus to qualify a written contract, perfect with respect to its signification, been more uniformly and stringently enforced than within this State. The truth of this statement will conclusively appear by a reference to the cases collected in Stewart's Dig., p. 502, pl. 439.

“ This being the established general rule, the question arises, how is this present offer of parol evidence to be legitimated ?

“ These parties, as has been stated, are accommodation indorsers, and the name of the one stands before the other on the back of this note. The first inquiry therefore is as to the legal effect of that collocation ; does it form by settled rules of law an entire and definite understanding between these litigants ? If it does, to make the oral agreement admissible, which is here sought to be superinduced, it must rest on some exceptional ground, as such proof would be plainly excluded by the operation of the general principle above expressed.

“ In the case of *Johnson v. Martinus*, 4 Halst. 144, this precise question was before this court for consideration, and it was then explicitly held that an indorsement in blank does not constitute a complete written contract, and that therefore the understanding that subsisted between indorser and indorsee could be shown *altunde* in a suit between them. But in the opinion read in the Court of Errors in the before-cited case of *Chaddock v. Vanness*, this decision was emphatically disapproved, and as such criticism was not dissented from by any member of the court, so far as I know, it is not to be regarded as an absolute authority. Intrinsically considered, it is difficult to see how it can sustain itself. It is founded on the broad doctrine that the usual blank indorsement on a note is inconclusive with respect to the terms of the contract between indorser and indorsee, and that that contract is subject to all the uncertainties that attend the admissibility of oral

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testimony. In the case reported by Halsted the indorser signing the note in blank was allowed to stand, by force of extraneous evidence, in the same position as though he had signed it 'without recourse.' Such a doctrine is not consistent either with public policy nor with the great current of authority both at home and abroad. Under its prevalence these commercial contracts which are so common, and which in view of the convenience of trade should be so fixed and definite in their terms, would be the loosest contracts in use by men of business. It is not easy to believe that engagements which have been for such a length of time in every-day use, and which embrace interests of such magnitude, have been generally understood to be in such a state of instability. By the act of indorsement the indorser enters into an independent contract with the indorsee, and the law, *proprio rigore*, fixes with absolute certainty the terms of such contract, the promise of the indorser being that the antecedent names upon the paper are genuine; that the paper is due and payable according to its tenor; that the maker or previous indorser will pay it at maturity, if duly called upon and notified, or if they do not, upon due diligence being used, he himself will pay the same. According to the theory adopted in *Johnson v. Martinus*, all these terms are but implications of law which may be controverted and superseded by proof of an oral agreement of a different effect; that is, that the indorser, in a suit against him by his immediate indorsee, may show by witnesses that when he made such indorsement the understanding was that he did not guarantee the genuineness of the antecedent signatures, or some of them; that he did not promise that the note, on due presentment and notice, would be paid according to its tenor, or that he himself was to be exempted from all responsibility. It is, I think, very plain that such a doctrine as this, if it should prevail, would very materially impair the efficiency and value of commercial paper as an instrument of commerce. It would be virtually saying that an indorsee could not rely, with any reasonable confidence, on the security of his immediate indorser, unless all the various stipulations, inherent in the act of indorsement, should be entered in writing *in extenso*, above his name; and yet the probability is that such an entry has never yet appeared on the back of commercial paper. The very great inconvenience and uncertainty attendant on such a doctrine will be more fully appreciated by bearing in mind that it will attach to bills of exchange as well as to notes, so that such instruments, instead of bearing on their face the indubitable evidence of their own meaning, in effect would be subject in some degree, and to an unknown extent, to mutilation by the testimony of witnesses. It seems to me that it is not to be wondered at that the principle on which the case cited from Halsted's reports was decided, has been deprecated by a leading text-writer, and as I understand has been repudiated by our own Court of Errors, in the decision already referred to. 2 Pars. B. & N. 24.

"My conclusion on this point therefore is that it is a general rule of law that a blank indorsement, as between an indorser and his immediate indorsee, creates a definite contract in writing, as to such parties, which cannot be modified by a contemporaneous oral agreement. This result would seem, upon principle, decisive of the question arising in the present case, yet nevertheless there is another subject which cannot be properly passed in silence, for there are decisions which cannot fail to command much respect, which hold that as between an accommodation indorser and indorsee, the form of the note is not conclusive, and that in that connection parol evidence is admissible. The first of the cases here alluded to is that of *Phillips v. Preston*, 5 How. 278, and it is not to be denied that it is exactly to the purpose, for it explicitly declares that an agreement between first and second indorsers, for the accommodation of the maker, to share the loss equally, made at the time of indorsing the note, may be proved by parol. In that case, as in the present one, the first indorser had paid the note, and the suit was by him against the indorsee for contribution, on the ground that such was the oral understanding. I have examined this case with care, and although yielding to it all the deference that of right belongs to so high an authority, have altogether failed to be able to concur in the principles and reasoning on which its conclusion rests. The theory by which the result reached is attempted to be justified is this: That the suit is not upon the contract arising by law out of the act of indorsing, but on what is called the collateral oral arrangement. The rule is plainly admitted that written evidence cannot be altered by parol. To show in what distinct terms this admission is made, and also the rule of decision, the following quotation will suffice: Alluding to the extrinsic testimony, the opinion says: 'Were the action on the notes, and

this evidence offered to contradict them, it would be entirely different, because in an action on a note, parol testimony is not competent to vary its written terms, and probably not to vary a blank indorsement by the payee from what the law imports. * * * So between contending parties likewise, all prior conversation is supposed, so far as binding, to be embodied in the written contract. * * * But the parol evidence here is not offered in any action on the note, or to alter its terms or its indorsements; nor is any prior or contemporaneous conversation offered to vary the note or its indorsement, in an action founded on either of them. But it is offered to prove a separate contract, which was made by parol, and is of as high a character as the law requires, and this evidence is plenary and entirely satisfactory to substantiate the separate contract.' It will be observed that this reasoning admits the fact the indorsement constituted a definite contract, in writing, between the parties to the litigation, and that if the action was on that written contract the parol evidence would have been inadmissible, and it then asserts that there is what the opinion calls a collateral contract, upon which the suit was based. Now, what seems to me impossible to concede, is that on the facts stated there existed two legal contracts — an oral one and a written one. How can this be so, when the one is contradictory of the other? The written contract bound this first indorser, with reference to the rights of the indorsee, to pay the whole note; the oral contract bound him to pay only half. Such stipulations relate to the same subject-matter, and they cannot stand together, and the consequence is it must be conclusively presumed that the parties did not intend to establish such inconsistencies. Such a juncture presents nothing but the ordinary case of a conflict between the oral and written evidence; in that case the former requiring the first indorsee to pay the entire claim, and the latter binding him only to bear a moiety of it. It seems to me that it would despoil the rule, which is prohibitive of parol evidence in such matters, of much of its practical benefit, if the oral engagement, variant from the written one, can lay a separate ground of action. Such a principle would enable a person at his option to sue on the written contract or on a contemporaneous oral contract. The hypothesis on which the rule which excludes on such occasions contemporaneous oral stipulations, is the peremptory assumption that the parties at the given time, with respect to the same subject-matter, entered into but a single agreement. The reported case assumes that the first indorsee, in the same transaction and at the same time, agreed to pay the whole, and at the same time stipulated that he should pay only one-half of the money in question. In my opinion, upon principles thoroughly established, under the circumstances stated, the written indorsement constituted the only legal evidence that could be resorted to.

"The other cases in which the doctrine which I have here sought to controvert has been maintained, are those of *Weston v. Chamberlain*, 7 Cush. 404, and *Clapp v. Rice*, 13 Gray, 403; but it is not necessary to notice them further than to say that in neither of them does the subject appear to have been independently considered; the point in question being disposed of in a few words, and the only pertinent authority cited being that of *Phillips v. Preston*, which is above discussed.

"In the case now before the court, as I read the undertaking of the plaintiff, by force of his prior indorsement he agreed in writing to pay the whole of this money, so far as the defendant is concerned, and he cannot alter that agreement by the oral testimony in question.

"In closing it may not be amiss to remark that this case does not present the point above discussed as it is usually presented between two accommodation indorsers. There is another element in this affair, which is the fact that this plaintiff had admittedly become liable to the defendant for this money as indorser on the former note, to take up which the note now in suit was given. As a consideration for his indorsement on the note now in question he is released by the defendant from his liability on the former one. Inasmuch as this indorsee has taken this indorsement for value, the result is that if an oral engagement, differing from the legal import of the indorsement, may be set up here, so it can in all cases in the ordinary course of business "

In *Dry v. Thompson*, 65 Ala. 273, the court said: "The parol evidence allowed to be introduced in the court below to show that the defendant indorsed the bill in suit for the sole purpose of transferring the title to the plaintiff, and with no intent of rendering himself personally liable, was improperly admitted. The contract imported by the regular in-

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indorsement of a bill or note is of a fixed and definite character, and is interpreted by the law. It is legally incapable of explanation, contradiction, or modification, by parol evidence. This rule is founded on the soundest principles of reason and public policy, as well as on the weightiest authority. The reasons for its application to commercial paper are more cogent, if anything, than to other written contracts. In *Tankersley v. Graham*, 8 Ala. 251, the rule was declared by this court, in discussing its application to indorsements, to be too firmly established to be now unsettled, even if its correctness were doubted. There are cases which hold the contrary doctrine; but the weight of authority greatly preponderates against the admission of such evidence. *Chaddock v. Vanness*, 35 N. J. 517; 10 Am. Rep. 256, where the cases are arrayed; *Charles v. Denis*, 42 Wis. 56, cited in 24 Am. Rep. 333; 6 Blackf. 509; 23 Me. 392. Professor Parsons forcibly maintains this view of the question as being in entire harmony with reason as well as authority. 2 Pars. on B. & N. 520-521.

"As far back as *Goupy v. Harlen*, 7 Taunt. 159, an agent who purchased foreign bills for his principal, and indorsed them to him without qualification, was held liable to such principal on his indorsement. Persons holding bills in *in autre droit* must protect themselves in making transfers by some special form of words so as to prevent personal liability. Smith's Mer. Law, p. 291; *Charles v. Denis*, *supra*.

"In *Rodney v. Wilson*, 67 Mo. 123; s. c., 20 Am. Rep. 499, parol evidence was held inadmissible to show that the payee of the note at the time of transferring it by indorsement, agreed to assume payment of it unconditionally. The court say: 'It is evident that the verbal contract on which the plaintiff relied, and the contract implied by the indorsement, are inconsistent with each other, and cannot stand together. One is an undertaking to be bound absolutely; the other, an undertaking to be bound conditionally. The proof of the former has the effect of varying the latter. The rule is universal, that all prior and contemporaneous agreements are merged in the written undertaking * * * If the indorsee may thus qualify the legal effect of a regular blank indorsement, why may not the indorser be permitted, on the other hand, to escape all liability by showing that the indorsement was without recourse' * * *

"It is not to be denied that the cases involving this question are somewhat confused, and not entirely reconcilable. This results from a failure to recognize with sufficient clearness definite exceptions to the general rule; such as parol proof of a failure of consideration, or some other equities between the original parties to bills or between the holder and an indorsee affected with actual or constructive notice. Some of the decisions relax the rule, also in cases of irregular indorsements, as this court did in the case of *Hullum v. State Bank*, 18 Ala. 805. This indorsement was not made in due course of trade, nor by an original party to the bill. It was executed after the holder had acquired title, and after protest of the bill. It being doubtful on the face of the paper, whether the indorser intended to bind himself as guarantor or indorser, parol testimony was admitted to correct the ambiguity.

"We are not willing to enlarge the scope of these exceptions. It would tend to destroy the growing value of commercial paper, and to impair a salutary rule of evidence, which was designed to correct the proverbial infirmities of human memory, and has done much to close the flood-gates against frauds and perjuries."

HOLDERBAUGH v. TURPIN.

(75 Ind. 84.)

Administrator — agreement to arbitrate — statute of frauds.

An administrator having brought a suit in his representative capacity, the parties orally agreed to submit the subject-matter to arbitration, and that if the award proved satisfactory each should pay half the costs, but if unsatisfactory, the party refusing to accept should pay all the costs. The arbitration was executed, the administrator refused to accept the award, prosecuted the action to judgment, and the defendant paid the costs and sued the administrator individually for repayment. *Held* maintainable.

ACTION of assumpsit. The opinion states the case. The plaintiff had judgment below.

J. E. McCullough and L. C. Embree, for appellant.

R. M. J. Miller, for appellee.

ELLIOTT, J. The appellant assigns as errors in this cause: "1st, The overruling of his demurrer to plaintiff's complaint; 2d, The overruling of his motion for a new trial."

The material allegations of the complaint briefly stated are that the appellant, as administrator of the estate of Eliza Slaven, deceased, brought an action in the Gibson Circuit Court against the appellee, and that while such action was pending, the parties agreed to submit the matters in controversy to three disinterested persons for decision and arbitration, and to continue the cause until the next term of court; that if the award should be satisfactory to both parties then each should pay one-half the costs, and the action should be dismissed; but if the award should not be satisfactory to both parties, then the party refusing to accept the award should pay the entire costs of the action up to that date; that the matters in controversy were submitted to the arbitrators, who made an award, which the appellant refused to accept; that the appellant afterward prosecuted the action to final hearing, and obtained judgment against the appellee for all the costs of the action; that the appellee has paid the costs, and that he has demanded repayment thereof from appellant, who refused to pay the same.

Appellant insists that the complaint is bad on demurrer for want

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of sufficient facts, because "it does not show that the appellant agreed to pay any costs out of his individual funds," and because the agreement, not being in writing, is within the statute of frauds.

The allegations of the complaint show a promise by the appellant. The demurrer confesses that the appellant made the promise sued upon; he is therefore not now in a situation to successfully assert that the promise was made by him as administrator, and that he is liable only in his representative capacity. The mere fact that the matters submitted to arbitration grew out of an action prosecuted by the appellant as administrator, does not warrant the inference, as against the positive allegations of the complaint, that he bound himself only in the capacity of administrator. *Long v. Rodman*, 58 Ind. 58.

The appellant builds an elaborate argument upon the proposition that the contract sued on is within the statute of frauds. The promise however is declared upon as the original undertaking of the party against whom the action is prosecuted. The consideration for the appellant's promise was the agreement to submit the matters in controversy to arbitration, and this was a new consideration, altogether different and distinct from the liability of the estate which he represented. There was not merely a new and distinct consideration for the contract, but the contract is different and disconnected from any undertaking of the decedent, as well as from any liability of his estate. In *Hackleman v. Miller*, 4 Blackf. 322, it was held that if a third person be induced to buy the note of a deceased person, by the promise of the administrator that it shall be paid, the promise is not within the statute of frauds, and within that ruling this case clearly falls. We do not however place our decision upon the ground that there was a valuable consideration for appellant's promise, but upon the ground that it was an independent and original contract. It is well settled that the statute does not apply to such contracts. *Anderson v. Spence*, 72 Ind. 315. When the contract was made the estate represented by appellant was not liable for costs, and there was then no debt existing. Whether there was any subsequent default depended entirely upon the appellant himself. It was in his own power at the time he made the contract to create or prevent a default. The only default for which his contract made him liable was his own. He did not undertake to answer for the default of anybody else. If he had kept his promise and abided the decision of the arbitrators agreed upon, there could have been

no default for which he would have been answerable. The default which creates a liability against him in this action is his own. He agreed to abide by the decision of the arbitrators or pay the costs. He broke his contract, and it is this breach which constitutes the default for which this action seeks to make him answerable.

Appellant has pressed upon our consideration the cases of *Crosby v. Jeroloman*, 37 Ind. 264, and *Krutz v. Stewart*, 54 id. 178, and urges that the doctrine which they declare cannot be reconciled with the reasoning in *Hackleman v. Miller*. Counsel are right in asserting that the mere fact that there is a valuable consideration for the new promise is not sufficient to take the case out of the statute. We understand the doctrine now generally recognized as correct, to be that the mere passing of a new and independent consideration from the promisee to the promisor does not take the case out of the operation of the statute of fraud. *Berkshire v. Young*, 45 Ind. 461; *Crosby v. Jeroloman*, *supra*; *Krutz v. Stewart*, *supra*; *Hayes v. Burkam*, 51 Ind. 130; *Irwin v. Hubbard*, 49 id. 350; s. c., 19 Am. Rep. 679; *Maule v. Bucknell*, 50 Penn. St. 39; *Chandler v. Davidson*, 6 Blackf. 367; *Kelsey v. Hibbs*, 13 Ohio St. 340; *Fullam v. Adams*, 37 Vt. 391. But we do not think that either the present case, or that of *Hackleman v. Miller*, rests entirely upon the ground that there was a new and valuable consideration for the promise relied upon as taking the case out of the statute. Of course, the fact that there was a new consideration is an important element, but it is not the controlling one.

It must be kept in mind that the subject-matter of the contract declared upon grows out of transactions which occurred after the decedent's death. The administrator's promise was not to pay some liability his decedent had incurred, nor to fulfil some engagement he had undertaken in his life-time. In *Mills v. Kuykendall*, 2 Blackf. 47, it was said: "The whole case shows that the object of the plaintiff was to charge the estate of the deceased, by obtaining a judgment against the administrators *de bonis intestati*. The promise of administrators, on a consideration originating subsequently to their intestate's death, cannot sustain such an action." *Carter v. Thomas*, 3 Ind. 213; *Cornthwaite v. First National Bank, etc.*, 57 id. 268. The undertaking of appellant was upon a consideration which accrued subsequent to the death of the intestate, and was to do a thing which the intestate's estate was not bound to do. It is impossible, in view of the authorities cited and the char-

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acter of the undertaking itself, to regard it otherwise than as the promisor's original contract.

In discussing the questions presented by the motion for a new trial, counsel again insist that the evidence shows a contract within the statute of frauds, but what we have already said upon that subject disposes of the question, as well, upon the evidence as upon the complaint.

It is urged that the evidence does not show that the appellant undertook otherwise than as administrator. It is conclusively shown that the consideration upon which he promised accrued subsequently to the death of his intestate, and the contract was therefore his individual one, to be enforced by a judgment *de bonis propriis*.

Counsel make a point upon the omission of the appellee to prove certain matters by the record. Parol evidence was suffered to be given without objection, and the appellant's complaint is entirely too late to be of avail. Such questions as the one immediately under mention must be made by proper objection in the trial court, reserved by exception, and presented in the motion for a new trial, or they can receive no consideration on appeal.

Lastly, counsel argue that no demand was proved. None was necessary. The appellant had agreed to pay the costs which appellee was compelled to pay, and there was a complete breach of his contract. A demand was not necessary to put the appellant in default; the breach of the contract did that.

Judgment affirmed.

CITY OF FORT WAYNE V. ROSENTHAL.

(75 Ind. 156.)

Municipal corporation — contract with officer of — when void.

The employment by a board of health of a city of one of its members to vaccinate pupils in a public school is void as against the city, where the members of the board are by statute only authorized to receive an annual salary to be fixed by the common council.

ACTION for services. The opinion states the case. The plaintiff had judgment below.

A. Zollars and F. T. Zollars, for appellant.

W. G. Colerick, H. Colerick, and T. W. Colerick, for appellee.

WOODS, J. Error is claimed in the sustaining of the demurrer to the second paragraph of the answer, and in the overruling of the motion for a new trial.

The answer referred to is nothing more than an argumentative denial of the indebtedness charged in the complaint, and if good, admitted of no proof which was not admissible under the general denial, which was also pleaded.

The principal question presented under the ruling upon the motion for a new trial, is whether the finding and judgment of the court are in accordance with the law and the evidence.

There is no material dispute about the facts of the case, which are substantially as follows: The appellee is a physician, and, together with Drs. Erwin and Myers, constituted the board of health of the city of Fort Wayne during the year 1869. On November 9, 1869, the small-pox appeared in the city in a malignant form, and it became necessary to take steps to prevent the spread of it. The public schools were in session, on the same day the common council of the city adopted a resolution, "That the board of health be authorized to notify the public that an examination of scholars at the various schools will be made by said board, and if deemed necessary to vaccinate, they will order it done by the family physician; and if parents are unable to pay for it, the same shall be done at the expense of the city." Notice was accordingly published in the *Sentinel* on the 11th, that the board would visit the East End free school on the 12th for the purpose of inspecting the vaccination of the pupils, and that absentees must call on the board before re-admission. The following ordinances of the city, admitted to have been duly passed, were put in evidence:

Chapter 14, passed April 14, 1866:

"SEC. 6. The board of health may take such measures as they may from time to time deem necessary to prevent the spread of the small-pox, and all other contagious and pestilential diseases, by issuing an order requiring all persons in the city or any part thereof, to be vaccinated within such time as they shall prescribe; and all persons refusing or neglecting to obey such order shall be liable to the penalties hereinafter provided for the violation of this chapter

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Provided, that it shall be the duty of the board to provide for the vaccination of such persons as are unable to pay for the same, at the expense of the city."

Chapter 49, passed April 28, 1878 :

"SECTION 1. The common council shall, at their annual meeting, appoint as a board of health of said city, three respectable physicians, at least one of whom shall be a practicing physician, which board shall serve one year and until their successors are appointed and qualified.

"SEC. 2. Said board shall appoint one of their number president who shall preside at their meetings and shall be, *ex officio*, the health officer of said city; and a secretary who shall keep an accurate record of their proceedings in a proper book to be furnished by the city. Any two of such board shall constitute a quorum.

"SEC. 3. The board of health shall have power, whenever it may deem it necessary for the health of the city, to take the most prompt and efficient measures to prevent the introduction of malignant or infectious diseases in the city, and for the immediate and safe removal of any person or persons who may be found therein infected with any such disease.

"SEC. 4. It shall be the duty of the health officer to examine into all nuisances, sources of filth, and causes of sickness in the city, which may come under his observation and when notified of the same, and he shall cause the same to be removed or destroyed or disinfected, under the direction of the board of health, at the expense of the person on whose premises such nuisances causes of sickness, or sources of filth shall be found to exist. * * *

"SEC. 11. The board of health shall each be paid an annual salary to be fixed by the common council.

"SEC. 13. It shall be the duty of the board of health, whenever any person or persons are sick with contagious, infectious or malignant diseases, to inquire into the circumstances of such person, and if he be a pauper, to notify the trustee of Wayne township to take care of such pauper and remove him to a safe place, and no expense shall be incurred on the part of the city for the care and removal of such pauper, except in case of emergency, when the most prompt and speedy action may be deemed necessary by said board."

The record of the proceedings of the board of health on November 8, 9, 12, 15, 16, 17, and 26, 1869, were put in evidence, showing their order for a general vaccination of the pupils of the

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schools, their visits to the schools for the inspection of the vaccinations, and reciting the fact of vaccinations made.

The plaintiff testified, and there was no opposing testimony, that the board, Dr. Erwin and himself only being present, employed him to vaccinate pupils in the schools whose parents were unable to pay therefor, and that he did accordingly vaccinate two hundred and eleven pupils, who, and whose teachers, said that their parents were unable to pay therefor, and whose parents, from all he could learn and as he believed, were not able to make such payment. The value of such service was proven, and the court found it to be \$150. The plaintiff's salary as a member of the board of health was \$75, which had been paid him for the year 1869.

This brings us to the question whether for the services so by him rendered the appellee was entitled to compensation from the city. The appellant disputes the right on two grounds: First, that the appellee did the service as a member of the board of health of the city, and is therefore entitled to no compensation beyond his salary; and, second, that the board of health had no power, and on the grounds of public policy was forbidden to employ one of its own number to do such service; and especially, that the appellee's employment was invalid, because made by himself and one other only of the members of the board. We do not assent to the proposition that the services were such as came within the appellee's duties as a member of the board of health. The ordinances which were put in evidence, and on which the appellant makes this claim, do not impose on the board or its members the duty to do, but only to provide for the doing of such services. The second ground, however, seems tenable. The board and its members held positions of trust and confidence toward the city. Their responsibilities in reference to the services, for which the appellee claimed compensation, were at once important and delicate. It was for them to decide whether an emergency had arisen, and what children were entitled to be treated at the public expense. The emergency, if it existed at all, was such as called for immediate and authoritative decision upon the case of each applicant. According to his own testimony, the appellee took upon himself his share of this responsibility. He went to the school-houses and upon the statements of the children and their teachers that their parents were unable to pay for it, he did the work himself, at the rate probably of one hundred and fifty or more per day, and charged the city one dollar for each vaccina-

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tion. The antagonism between the appellee's private interest and his public duty, it is manifest, was very great, and calculated to cast suspicion upon his discharge of duty, no matter how faithfully and conscientiously it was done. Let it be understood that such personal advantage may result to a member of the board, and such suspicion not only attaches to his selection of those who may be served at public expense, but it extends to and taints the original decision and declaration of the board, that an emergency existed which required the work to be done.

[Omitting a statutory consideration.]

But if this were not so and the case were to be determined by the general principles of law, the result would be the same. Section 52 is only a re-enactment of the well established rule that an agent in reference to the subject of the agency, must not put himself in a position which is adverse to that of his principal. As agent he cannot contract with himself personally. He cannot buy what he is employed to sell. If employed to procure a service to be done, he cannot hire himself to do it. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case which comes within its reason.

It follows that the services rendered by the appellee were not rendered at the request of the city or of an authorized agent who could employ the appellee. They were therefore voluntary services, and they conferred upon the city no value or benefit which could have been rejected, and by keeping which the city can be said, within the authorities on the subject, to have ratified the contract and to be liable upon a *quantum meruit* or *quantum valebat*.

The judgment is reversed with costs and with instructions to grant a new trial.

Judgment reversed, with costs.

KISTLER V. HERETH.

(75 Ind. 177.)

Limitation, statute of — disability arising subsequently to its attaching.

When the statute of limitations has once attached, no disability subsequently arising will postpone its operation. (*See note, p. 134.*)

ASSAULT and battery. The opinion states the case. The defendant had judgment below.

I. Klingensmith, for appellant.

Howe, C. J. This was a suit by the appellant to recover damages for an assault and battery, alleged to have been committed upon him by the appellee, on the 5th day of September, 1874. The suit was commenced on the 13th day of July, 1877. To the appellant's complaint the appellee answered in two paragraphs, in substance as follows:

1. A general denial; and
2. That the cause of action in appellant's complaint mentioned did not accrue within two years before the commencement of this suit.

The appellant replied to the second paragraph of answer in two paragraphs, of which the first was a general denial, and the second paragraph stated affirmative matters by way of reply. The appellee's demurrer for the want of facts, to the second paragraph of reply, was sustained by the court, and to this ruling the appellant excepted; and upon this ruling judgment was rendered against him for the appellee's costs.

The only error assigned by the appellant in this court is the decision of the Circuit Court, in sustaining the appellee's demurrer to the second paragraph of his reply to the second paragraph of answer. In his second reply the appellant alleged in substance that after the commission of the assault and battery, as charged in the complaint, to wit, on the 5th day of September, 1874, and while the appellant was suffering therefrom and confined to his room from the effects thereof and unable to prepare a suit against the appellee for said cause of action, the appellee, conspiring with one Joseph K. Forbes and others, whose names were unknown to the appellant, to have him, the appellant, indicted for the crime commonly called black-mailing, and convicted and incarcerated in the State's prison, procured an indictment to be returned against the appellant, and had him arrested on the 19th day of September, 1874, and convicted and sentenced to the State's prison, and confined therein from the 17th of November, 1874, until the 4th day of October, 1875, when he was returned from said prison and discharged from said indictment and imprisonment; and the appellant

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averred that after deducting the time of his said imprisonment this suit was commenced within two years after the removal of said disability of imprisonment. Wherefore, etc.

It is very clear, we think, that this second reply did not state facts sufficient to constitute a good reply to the appellee's answer, setting up the statute of limitations in bar of the cause of action stated in the complaint. It appeared from the allegations of both his complaint and his second reply, that the appellant's alleged cause of action had accrued on the 5th day of September, 1874, and that this suit thereon was not commenced by him until the 13th day of July, 1877, or nearly three years after the accruing of his said cause of action. In section 211 of the Code of 1852 it is provided that actions for injuries to the person, such as the one at bar, shall be commenced within two years after the cause of action has accrued, and not afterward. 2 R. S. 1876, p. 122. Section 215 of the Code of 1852 however provides that "Any person being under legal disabilities when the cause of action accrues may bring his action within two years after the disability is removed." We quote this section from 2 R. S. 1852, p. 77, as there is a palpable misprint of the section, making it difficult to be understood, as it appears in both 2 G. & H., p. 161 and 2 R. S. 1876, p. 126. The section as quoted is re-enacted as section 42 in the Civil Code of 1881. It was shown by the averments of the second reply that the appellant was imprisoned from the 19th day of September, 1874, until the 4th day of October, 1875, and while thus imprisoned he was "under legal disabilities," within the statutory definition of that phrase as given in section 797 of the Code of 1852, 2 R. S. 1876, p. 313.

But this defect in the second reply lies in this, as it seems to us, that it wholly fails to show that the appellant, when his cause of action accrued, was under any legal disability of any kind. Section 215 of the Code above quoted only provides for the case where the plaintiff is under legal disabilities when his cause of action accrues, and authorizes him to "bring his action within two years after the disability is removed." In the case at bar the appellant's cause of action accrued, as we have seen, on the 5th day of September, 1874, and he was not then, nor for two weeks afterward, so far as his second reply shows, under any legal disability. The statute of limitations began to run against his alleged cause of action from the time it accrued, and had run for two weeks, as shown by the reply, before his arrest and imprisonment. In such a case the

name of the firm. The partnership as it existed when the share was purchased, was dissolved, and another formed, composed of David Stewart and Somervail. The share in question remained with the new firm, but continued to stand in the name of David Stewart. Stewart borrowed money of Redfearn, and to secure it, assigned the share, and a contest arose between him and Somervail, who of course had only a *latent equity*. Intimation (notice) of the assignment was duly given to the Glasshouse Company by Redfearn, which, by the law of Scotland, completed the transaction and gave him a right to the share, good against even a prior assignment that had not been intimated. Somervail's claim was no more than a secret equity between himself and Stewart, while the latter, with *his consent*, held the ostensible title, which enabled him to pass a legal right to his assignee. That case has no application here. The appellant does not seek to enforce a mere latent equity against an assignment made by one, who with his knowledge and consent, held the legal title. He does not assert an equity at all, but the legal title, which he confessedly held, and with which he never consented to part, and which, as we shall hereafter see, no rule of law or principle of natural justice prevents him from insisting upon.

The general rule is, that the owner of property cannot be divested of his title otherwise than with his consent, either expressed or implied. To that rule there are some exceptions, one of which applies to negotiable securities. If such papers, payable to bearer or indorsed in blank, be lost or stolen, and be passed, in the ordinary course of business, before maturity, into the hands of an innocent holder for value, and without notice of the fact that it has been so lost or stolen, such holder, though he take it from the finder or the thief, gets title to the paper and a right to enforce payment just as if he had received it directly from the person who lost it or from whom it was stolen.

This however is a rule of public policy and not of natural justice. It is a rule adopted for the convenience and security of commerce, and should not be extended beyond the requirements of trade. And in respect to negotiable paper, strictly so called, such as bills, checks, and negotiable notes, it has been restricted to the time of maturity, so that no one denies that the well-settled law is, that one who takes such an instrument after maturity takes it subject to all the equities and defenses that might have been made against it in the hands of the person from whom he received it. This rule puts an end to the

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use of such paper for commercial purposes after it becomes due, and there would seem to be no reason why it should not be at once relegated in all respects to the position it would have occupied if it had never been elevated above the dignity of an ordinary chose in action.

Without examining into the reasons upon which it has been held that coupon bonds, having a long time to run, are to be treated as negotiable, or intimating an opinion as to the correctness of that conclusion, it is sufficient for this case to say that they have never, to our knowledge, been claimed to be upon any higher plane of security than notes, bills, or checks, and that there cannot, in the very nature of the case, be any reason for placing one who takes such bonds when past due upon any more favorable ground than the taker of an overdue bill or note.

It is because bills and notes cease, after maturity, to supply the place of money, that the interests of commerce are supposed not to demand their further protection.

Before maturity, coupon bonds are sought for as safe securities upon which to loan money ; but when they mature they are not desirable as an investment, and they are not purchased for any such purpose. If purchased at all, it is upon speculation and out of the ordinary course of business, and there is no sufficient reason why they should be kept any longer under the protection of a rule against natural right, the reasons for which no longer exist.

Whoever takes a bill or negotiable note after maturity, takes it, so far as the title to and integrity of the paper is concerned, upon the credit of the person from whom he receives it. He gets whatever right and title that person had, and no more, and the principle upon which that rule, as to bills and notes, is placed, applies with equal force to coupon bonds.

We are therefore of the opinion that the court erred in adjudging in favor of the appellee ; and the judgment is reversed, and cause remanded for a judgment in conformity to this opinion.

Judgment reversed.

Taylor's Administrator v. Pennsylvania Company.

TAYLOR'S ADMINISTRATOR V. PENNSYLVANIA COMPANY.

(78 Ky. 848.)

Statute — extra-territorial force.

An administrator appointed and suing in Kentucky cannot maintain an action for the death of his intestate by negligence in Indiana, such action being maintainable under the Indiana statute but not under that of Kentucky.*

ACTION of damages for negligent killing of plaintiff's intestate. The opinion states the case. The defendant had judgment below.

M. Munday, for appellant.

Chas. H. Gibson, for appellee.

COFER, J. The appellant, as administratrix of her deceased husband, William Taylor, brought this action in the Jefferson Circuit Court against the appellee to recover damages for the loss of the life of her intestate through the negligence of the appellee.

The petition showed that the intestate was domiciled in Jefferson county, in this State, at the time of his death; that the appellant was appointed administratrix by the County Court of that county, and it also showed that the intestate was killed in the State of Indiana, while acting in the capacity of brakeman on one of the appellee's trains.

The action was based on an Indiana statute, which provides as follows: "When the death of any one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The appellee demurred, and the court sustained the demurrer and dismissed the petition.

*To same effect *Buckles v. Ellers* (72 Ind. 220), 37 Am. Rep. 158, and note, 160; *Leonard v. Col. St. Nav. Co.* (84 N. Y. 48), 38 Am. Rep. 491.

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By the rules of the common law no civil action could be maintained by any one for the death of a human being. But both in England and in many of the States of our Union this defect in the common law has been remedied by statute. In some States a right of action is given to the widow and children of the deceased, and in others it is given to his personal representatives.

In this State the right of action in one class of cases is given to the widow and children (or either or any of them) of the person killed. § 6, chap. 1, Gen. Stat.

In another class the right is given to the personal representative alone (§ 1, chap. 57, Gen. Stat.), and in still another class to the widow, heir, or personal representative. § 3, chap. 57.

In Indiana, Illinois, Ohio, and New York, and perhaps in other States, the right of action is given to the personal representative, but the recovery is declared to be for the exclusive benefit of the widow and children or next of kin of the decedent.

Under these statutes the recovery is not an asset in the hands of the administrator, to be disposed of as the estate of the decedent, but he takes it as trustee for those who are declared by the statute to be beneficiaries. *Chicago v. Major*, 18 Ill. 349; *Woodard v. Railroad Company*, 10 Ohio St. 121. As said in the latter case, "it is a right of action given by statute, not to the intestate but to his personal representatives; not as general assets, but as a trust for the widow and next of kin in respect of a pecuniary loss they are supposed to have sustained."

The personal representative does not take it in virtue of his office, but is the person designated by statute in whose name it is to be recovered, not for the ordinary purposes of administration, but to be distributed as a trust fund.

A personal representative, as such, has no rights or powers beyond the jurisdiction of the government under whose laws he received his appointment, and *a priori* he cannot have any rights nor be subject to any obligations or duties not imposed by the law of his official domicile. He cannot carry his official character abroad, nor can his official powers and duties at home be affected by foreign laws.

A Kentucky administrator, suing in a Kentucky court, must be able to show that the laws of Kentucky entitle him to the thing sued for. He cannot receive his office from one jurisdiction and appeal to the laws of another jurisdiction for rights or powers not given by the law which created him.

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Nor can we for a moment suppose that the legislature of Indiana intended that the law should have any extra-territorial operation. When the statute confers a right of action on personal representatives, and prescribes their duties with respect to the money they may recover in such actions, we must suppose reference is made to personal representatives appointed under the laws of Indiana. The legislature of that State has no power to prescribe the duties of a personal representative appointed under the laws of another State, and it would be absurd to suppose that it intended to do so.

If the appellant could recover in this action, she would hold the sum recovered subject to be disposed of under the laws of this State. It would be subject to the payment of her husband's debts, and might be wholly consumed by them, and thus a part of the law under which she seeks to recover would be defeated. And we do not hesitate to believe that if another should qualify in Indiana as administrator of appellant's intestate, and institute suit against the appellee on the same cause of action set up in this case, the courts of Indiana would promptly decide that the recovery here constituted no bar to that action.

[Minor point omitted.]

Wherefore the judgment is affirmed.

Judgment affirmed.

JACKSON V. JACKSON.

(78 Ky. 390.)

Bastard — inheritance.

A bastard cannot inherit from his mother's ancestors.

THE opinion states the point.

Owen & Ellis, for appellant.

C. K. Tharp, for appellee.

COFER, J. It must now be regarded as the settled law of this State that a bastard cannot inherit from collaterals from whom his mother, if living, would have inherited. *Allen v. Ramsey*, 1 Metc. 635, and authorities there cited; *Berry v. Owens*, 5 Bush. And it

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would seem to follow, as a necessary logical sequence, that he cannot inherit from the ancestors of his mother.

The language of the statute is, that “bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother.”

In the decisions heretofore rendered to the effect that a bastard cannot inherit from collaterals through the mother, the words “on the part of the mother” have been held not to be equivalent to the words “through the mother.” In other words, “on the part of” the mother seem to have been regarded as signifying no more than “from the mother.” And this construction is somewhat fortified by the fact that a bastard can only transmit an inheritance in the ascending line “to his mother.”

There are some expressions in *Scroggins v. Allen*, 2 Dana, 363; *Remington v. Lewis*, 8 B. Monr. 606, and *Allen v. Ramsay*, 1 Metc. 635, which seem to indicate that a bastard may inherit through his mother from her ancestors; but no such question was presented in any of the cases, and it seems unreasonable to suppose that the legislature intended to give to an illegitimate the right to inherit through his mother from the mother’s ancestors and not from her collaterals; and in order to preserve harmony in the construction of the statute, we are compelled to hold that a bastard cannot inherit through his mother from her ancestors.

Counsel cite cases from the decisions of other States, some of them construing statutes not very dissimilar to our own, in which a different conclusion has been reached, and one (*Dickinson’s Appeal*, 42 Conn. 491; s. c., 19 Am. Rep. 553), in which the whole common-law doctrine in respect to the incapacity of bastards to inherit from and through their mothers is rejected, without the aid of a statute.

But on the other hand, the interpretation given to our statute in former decisions is supported by the decision of the Supreme Court of the United States in *Stephenson v. Sullivan*, 5 Wheat. 207, and by the Supreme Court of Massachusetts, *Curtis v. Hewens*, 11 Metc. 294.

Wherefore the judgment is reversed, and cause remanded, with directions to dismiss the petition.

Reversed and dismissed.

AARON V. MENDEL.

(78 Ky. 427.)

Surety — guardian and ward — fraudulent settlement — acquiescence.

Acquiescence by a ward, for four years after majority, in a settlement made by him with his guardian, precludes him from impeaching it for fraud as against the surety, although the guardian was insolvent. (*See note, p. 250.*)

SUIT on guardian's bond. Defense, a settlement between the guardian and the ward on the ward's attaining majority. The opinion states other facts. The defendant had judgment below.

Russell & Helm, for appellant.

Harlan & Willson and *Boland & Burnett*, for appellee.

COPER, J. [Omitting statement of facts.] The evidence shows satisfactorily that the release was unfairly procured, and although there is no evidence whatever of any complicity on the part of Julius Mendel with Z. D. and Rachel Mendel in procuring the release, yet if the release had been attacked within a reasonable time after it was obtained, or after the influences which induced its execution were removed, and after the appellants were in a condition to assert their rights, we should not hesitate to hold that it would afford no protection even to the innocent surety.

But from the nature of the transaction, Mrs. Aaron must have been aware at the time she executed the writing that it was unjust and ought not to bind her. Soon after her marriage she and her husband took legal advice on the subject and were fully advised of their rights in the premises; yet they stood by apparently acquiescing in what she had done, for four years after the release was executed and for three years after her husband attained his majority, and after they were fully advised of their rights, without taking any step to obtain relief and without notice to the surety that they would not abide what had been done.

During the greater part of this time Julius Mendel was aware that the release had been executed, but was not, as far as appears, aware of the means by which it had been procured or that Mrs. Aaron or her husband was dissatisfied with it.

Knowing that a release had been given and hearing no complaint of it, he had a right to assume that it was satisfactory, and that his

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liability as surety for the guardian was at an end. He was not bound to inquire into the terms of the settlement or the manner in which the release was obtained, but from his knowledge of its existence, and being in ignorance of the fraud and undue influence by means of which it was procured, there was nothing to put him on inquiry, and he not only had no reason to seek indemnity, but on the facts known to him he had no legal ground upon which to ask it. Thus matters stood for at least three years, during all of which time Aaron and wife knew all the facts, as well as their legal rights growing out of them, but they failed to take any steps to avoid the release or even to give notice to the surety that they intended to do so.

The relation between a creditor and one known to him to be bound only as surety for another is one of trust and confidence, and demands the utmost good faith on the part of the creditor. Story's Eq., § 324; *Burks v. Wonterline*, 6 Bush, 20; *Mount v. Tappey*, 7 id. 617.

Was the conduct of Aaron and wife such as good faith toward the surety demanded?

As long as they failed to repudiate the settlement and release the hands of the surety were tied. Their silence was equivalent to a declaration that they were satisfied, and the surety knowing that the release had been executed, was lulled into supposed security. He neither knew the necessity for seeking indemnity nor had the legal right to demand it. He had no right to pay the debt and assume himself the position of a creditor. Until they should elect to avoid the settlement and release there was no debt to pay, and this they might never do; and having kept him so long in a position in which he was authorized by their conduct to believe he was finally discharged, and in which he was deprived by them of all right to seek indemnity, they were guilty of such bad faith toward him as ought, in equity and good conscience, to prevent them from now recovering.

In *Kerby v. Taylor*, 6 Johns. Ch. 248, Chancellor KENT held that a release of the principal by the ward, without the knowledge or consent of the surety, and acquiescence in the release for a period of twenty months, there being no pretense of fraud set up, was "a complete exoneration of the surety. He had a perfect right to regard the discharge as valid, and it deprived him in the meantime of the opportunity of obtaining indemnity."

That there was fraud in this case and none in that can have no other effect than this: as long as the fraud was concealed the ward could take no step to avoid the release on that ground, and consequently non-action on his part would do no wrong to the surety; but when the fraud becomes fully known, and the ward is fully advised as to his rights, the fraud can no longer present an obstacle to his proceeding to avoid the release, and the consequences should be precisely the same as if the release had been procured without fraud.

It is no answer to the argument drawn from the great delay to take steps to avoid the release, to say that the principal was insolvent, and no indemnity could have been procured by the surety if he had been immediately informed of the fraud and the election of the ward and her husband to avoid the release on that ground. It is impossible to say what might have been accomplished either by legal proceedings or by personal persuasion, and moreover, when the creditor has been guilty of bad faith toward the surety, which might have injured him, the court will not stop to inquire whether he has actually been injured or not.

Nor does the fact that Mrs. Aaron was a married woman and that the money was due in her right affect the question.

She was sole when the release was given, and she knew she had not voluntarily signed it, and her subsequent marriage could not relieve her from the duty already imposed to repudiate it within a reasonable time.

We are therefore of the opinion that the judgment should be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Mitchell v. Homfray*, English Court of Appeal, March, 1881, 45 L. T. Rep. (N. S.) 694, an action brought by the executors of Mrs. G., to recover a sum of £800 alleged by the defendant to have been given by Mrs. G. to him, it was admitted that at the time the gift was made the defendant was acting as Mrs. G.'s medical adviser, and that she had no independent advice of any kind. The jury found that the advance of £800 was not a loan but a gift, that there was no undue influence on the defendant's part, that the relation of patient and medical man had come to an end more than three years before Mrs. G.'s death, and that after that relationship had come to an end, and any effect produced by it had been removed, she intentionally abode by what she had done. Held, that the gift was not void but voidable; and as Mrs. G. must be taken upon the findings of the jury to have known that it was voidable and not to have avoided it, the defendant was entitled to judgment. The lord chancellor said: "Although it is true that she had no independent advice when the gift was made, I think that no authority goes the length of saying that another person after her death may do that which she determined not to do. The case of *Rhodes v. Bates*, L. R., 1 Ch. App. 252, though it goes further than any other, laying down that wherever there is a confidential relationship the beneficiary must show not

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only that there was no impropriety in the gift, but that the donor had independent advice, does not go on to say that that is necessary if there is a deliberate intention to abide by the transaction after the influence has ceased and any effect produced by the relationship has been entirely removed. There is not much authority to assist us in arriving at our decision, which is in favor of not disturbing this judgment; but there is some. The case of *Dent v. Bennett*, 4 Myl. & C. 209, was a case where the gift was set aside; but I find this passage of the lord chancellor (COTTENHAM) at p. 275: 'There is an absence of all evidence of the testator having at any time recognized, or in any manner given any proof of approval of the agreement, or of any consciousness of its existence.' That does not go far to show what the effect of such evidence would be; but at least it shows that it would have been a very material element in arriving at a decision in that case. In the case of *Wright v. Vanderplank*, 8 DeG. M. & G. 133, TURNER, L. J., who delivered the judgment in *Rhodes v. Bate*, L. R., 1 Ch. App. 252, says, at p. 146: 'A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way.' I do not lay much stress on that; but I know of no reason for supposing that the law on this point as between doctor and patient differs from that as between parent and child. The lord justice continues: 'When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate unbiassed intention on the part of the child to give to the parent. Applying these considerations to the present case, it is difficult to say that the transaction could have been maintained if the case had rested upon the mere circumstances which attended the original gift. I think that it could not. I am satisfied that the court would be departing from established principles in upholding it. The transaction had its inception at a period when the minority had just terminated. It was completed while the parental influence and authority was in full force, and there was no independent advice given to the daughter. The transaction therefore was impeachable at and after its completion; and the only question is, whether it has become unimpeachable by reason of what has subsequently occurred. It has been argued at the bar that it has not; for that some positive act was required to make it so, and that here no such act has been done. I am not of opinion that a positive act is necessary to render the transaction unimpeachable. All that is required is proof of a fixed, deliberate, and unbiassed determination that the transaction should not be impeached. This may be proved either by the lapse of time during which the transaction has been allowed to stand, or by other circumstances. Here I have no doubt that there was a fixed, deliberate, and unbiassed determination on the part of the lady that the transaction should not be impeached.' * * * Here not only have the jury found that after the influence of the relationship of doctor and patient had come to an end the patient intentionally abode by her gift, but that she did so after the relationship itself had ceased. I think that the principles laid down in the cases that I have cited justify us in affirming this judgment." BAGGALLAY and BRAMWELL, concurred. See *Audenreid's Appeal*, 89 Penn. St. 114; s. c., 33 Am. Rep. 731.

STRUBBEE V. TRUSTEES CINCINNATI RAILWAY.

(78 Ky. 481.)

Accession — timber — conversion into ties — bona fide purchaser.

The owner of trees, cut on his land by a trespasser and by him converted into railroad ties, may recover them from an innocent purchaser from the trespasser. *

* See *Hazellon v. Weeks* (69 Wis. 661), 35 Am. Rep. 796; *Murphy v. S. C. & P. R. Co.*, ante.

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Action to recover personal property. The opinion states the facts. The plaintiff had judgment below.

Morrow & Newell, for appellant.

Hill & Alcorn, for appellee.

PRYOR, C. J. This was an action instituted in the Pulaski Circuit Court for the specific recovery of 2,600 railroad cross-ties. Strubbee, the appellant, owned the land from which the timber was cut and out of which the cross-ties were made. The ties were hauled and stacked on the line of the Cincinnati railway and sold by E. T. Wells & Co. to the trustees of that road.

It is an admitted fact that the timber was cut and delivered to Wells & Co. by parties who were trespassers on appellant's land, having entered and taken his timber without any license from the owner and in the absence of any claim whatever. It also appears that Wells & Co., who are the vendors of the ties to the Southern railway, were purchasers in good faith from the original trespassers, without notice of the trespass or the existence of any claim on the part of the appellant. The testimony shows that the timber taken was worth in the tree from five to fifteen cents per stick, and when converted into cross-ties each tie was worth thirty-four and one-half cents.

The court below refused to instruct the jury that the plaintiff (appellant) was entitled to recover the cross-ties or their value, but instructed the jury to find for the appellant the value of his timber in the tree when taken by the trespassers. Of this instruction the appellant complains, and the appellee (the Cincinnati Southern railway) prays a cross-appeal, and insists that the court erred in instructing the jury to find the value of the timber at the time it was taken, as the action was alone for the recovery of the specific property.

The question arising in this case is, can the original owner recover his property taken by a trespasser and by his labor greatly enhanced in value, when the property claimed has been sold by the wrong-doer to an innocent purchaser, for its full value in its improved condition? It is well settled that a trespasser acquires no title to property that he has taken and converted to his own use; but it is insisted that where the rights of an innocent purchaser intervene

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this doctrine has no application, and that in such cases the *bona fide* purchaser acquires title although the party from whom he purchased had none. It is also maintained that the right of the innocent purchaser to hold the property acquired from the trespasser, is limited to cases where its value by reason of the labor and skill bestowed upon it by the wrong-doer has greatly enhanced its value. That if the value of the property has been greatly increased in the hands of the wrong-doer, he can pass title to the innocent purchaser from him so as to defeat the claims of the real owner; but if the value has not been greatly enhanced the owner may recover. That the original owner has title to his timber, but the innocent purchaser has the title or right to the results of the wrong-doer's labor upon it.

This doctrine is announced in the case of the *Lake Shore and Michigan Southern Railroad Company v. Hutchins*, 32 Ohio St. 571; s.c., 30 Am. Rep. 629, and seems to have controlled the decision of this case in the court below. That case has gone further in denying the right of recovery to the owner of his property or its value than any case to which our attention has been called.

The facts appearing in the case cited conduced to show, that a large quantity of wood and railroad ties was cut upon the land of the plaintiff by trespassers, and hauled to the railroad, where it was sold to the company without any notice of the rights of the owners, and the purchase made in the best of faith. The wood in the tree was worth one dollar per cord, and when delivered on the road was sold for three dollars per cord. The company was sued for the value of the wood and ties in its possession, and the court held that the measure of damages was the value of the timber as it stood on the plaintiff's land. It is conceded that the trespasser could gain nothing by his own wrong, and that the results of his labor passed to the owner of the property, but the innocent purchaser is protected on the idea that he has done no wrong. If the wanton trespasser acquires no title he can pass none to a purchaser from him, and there is no rule of law that will preclude the owner from recovering the property itself or its value. Every purchaser of property must know at his peril of whom he is purchasing; and if his vendee has acquired the property as a trespasser, a purchase from him, although in good faith, cannot be relied on as a defense to the claim of the real owner. No demand is even required to be made of the innocent purchaser in such a case, because having obtained the property from a wrong-doer his possession is tortious. This

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action is for the identical property sold the appellee (the railroad company) by the trespasser, without any change having been made in its condition, except such as had been caused by the labor of the wrong-doer ; and the rule is well established with scarcely an exception, that where the identity of the original article can be traced the right of property in the original owner continues to exist.

This rule is qualified by Justice Cooley, in his work on the Law of Torts, by adding, " unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at first blush." Cooley on Torts, 56. The objection to this qualification consists in the difficulty of applying a rule where the difference in the value of the property from its unimproved to its improved condition is to determine the right of recovery.

When the identity of the original article is lost, we can well see how the title is gone from the original owner, as where grapes have been converted into wine, or timber into a house, or corn into whisky, or where railroad ties have become a part of the road. In all such cases it will be adjudged, as a matter of law, that the identity of the article is destroyed, and the rights of the innocent purchaser will be protected. There has been such a mechanical transformation of the article as to destroy its identity, and the mere fact that the timber can be traced into a building, or the corn to the distillery in which the whisky was made or out of which it was made, is not such an identification of the property as would authorize its recovery.

It is true that the question of intention has much to do in determining the quantum of damages in action for torts.

The willful trespasser should be subjected to a severer punishment than one who commits a trespass under the belief that he is the owner of the property, or has the right to take it into possession. That question however is not involved in this case. The action is to recover the property itself. It is easily identified, and the only defense made is, that it has been improved so as to increase its value by the trespasser, and that the appellee is a purchaser from him in good faith. The action is not for the real injury done, but is for the recovery of property to which the owner has exhibited an undoubted title ; and while the law makes the distinction between a willful and an involuntary wrong-doer, as to the measure of damages,

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in an action to recover the property by the rightful owner, the one is as much responsible, if he has the possession and claims the title against the true owner, as the other. The innocent purchaser in this case has not converted the chattel into a different species nor made any change in the timber since the purchase, but holds the property in the same condition it was when purchased from the trespasser. If the timber had been worked into the depot buildings of the company, or made part of the road-bed by laying it down as ties, this annexation to the principal improvement would have divested the owner of title.

The case of *Wetherbee v. Green*, 22 Mich. 311; s. c., 7 Am. Rep. 653, was an action of replevin by Green, to recover a quantity of hoops made out of timber from Green's land. The defendant relied on a license to enter and cut the timber from one Sumner, who at one time owned the land jointly with Green. It turned out that Sumner, prior to the date of the license, had sold his interest to Camp and Brooks, and the latter uniting in the action with Green, claimed the value of the hoops. That the defendant entered under a mistake of fact clearly appeared, and it also appeared that the timber in the tree was worth only twenty-five dollars, and the hoops made out of this timber were worth seven hundred dollars. The court held that the owner could not recover the value of the hoops, but was entitled to recover the damages sustained by reason of the unintentional trespass. The recovery in that case was denied for the reason that the appropriation of the timber was made under a mistake of fact, and the labor expended upon it causing a substantial change of identity, and the original value being insignificant compared with the value of the timber as changed, the title should be held to have passed from the real owner. When an accidental appropriation or a conversion is made under a mistake of fact, it is conceded, that under certain circumstances, the purchaser must look alone to his action for damages. The general doctrine is that the accession of mere value by the application of skill and labor alone is insufficient to divest the owner of title. Exceptions are to be found to this rule, and the case cited comes within the exceptions. There the timber in the tree was worth only twenty-five dollars, and the *bona fide* laborer, although a wrong-doer, had increased its value to \$700. In such a case the accession of value to the raw material is such as to impress one at first blush with the injustice of permitting the *bona fide* producer of the increased value to be deprived of it.

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Cooley on Torts, 56. In applying the doctrine of accession to the acts of innocent parties, these exceptional cases seldom arise, and where the natural and distinctive qualities of the article remain the same, it is difficult to see in what manner it has lost its identity. In *Wetherbee v. Green*, COOLEY, J., delivering the opinion, says: "Having given the timber in its present condition nearly its entire value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances."

The same learned jurist, in the case of the *Royal Mining Company v. Hertin*, 37 Mich. 332; s. c., 26 Am. Rep. 520, held that where one, by a mistake as to the boundary of his land, entered upon the land adjoining, cut the timber, and made it into cordwood, and afterward hauled and piled it on the banks of Portage lake, the owner was entitled to seize and hold it against any claim by the unintentional trespasser. The wood on the bank of the lake was worth \$2.87 1-2 per cord, and the value of the labor expended by the plaintiff in cutting it and placing it on the bank was \$1.87-1-2.

The doctrine of title by accession was insisted on in that case, but it was held that the identity of the timber was not destroyed, nor its value so increased as to make the value of the timber in the tree insignificant when compared with it. The fact that the property has been increased in value is not sufficient to divest the owner of title, nor will the party performing the labor, although mistaken as to his rights, be entitled to compensation to the extent of the benefit received by the owner. One has no right to enter upon the property of another and there make improvements, however mistaken he may be as to his right, and require the owner to compensate him for his blunder. He must know the extent of his own possession, and if in ignorance of his rights benefits another, no recovery can be had, however innocently the mistake may have been made.

If the wanton trespasser is permitted to dispose of the property in a case like this to an innocent purchaser, for three times the value of the timber in the tree, it is ample remuneration to the wrong-doer for his labor, and the real owner is deprived of his property without his knowledge or consent. The prospective value of the timber to the owner is denied him. His wishes are not consulted as to the character and kind of timber to be taken from his woodland. He may desire it to remain in its primitive state, or as an ornament to his home, still

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he is told that the timber, as improved by the trespasser, enables the latter by a sale to an innocent purchaser to pass the title. Such trespasses are committed ordinarily by irresponsible parties, and when so well remunerated a second trespass will be committed with a view to similar results. It is not pretended that any labor was bestowed by the appellee (the purchaser) on this timber, or any money expended in changing its character or condition; and if such had been the case, it could not, upon the facts before us as to the change made in the property, have affected the owner's right of recovery.

In this case, if the company had been the original trespasser, under a mistake as to its right to the timber, the appellant (the owner) would have been entitled to recover, and when the original taking was a willful trespass, the *bona fide* purchaser acquired no greater right than the party under whom he claims could have asserted. The case of *Heard v. James*, 49 Miss. 236, relied on by the appellee, gave to the original owner the value of the timber in its improved condition. There the trees were severed and the timber converted into staves by a trespasser, and the latter was held responsible for their value. That case intimates that where the value of the thing has been enhanced by the labor and skill employed to adapt the material to a more useful purpose, under a mistake as to the right of ownership, the real owner will be confined to the value of the original article; but it is nowhere adjudged, except in the case reported in 32 Ohio, that the innocent purchaser can acquire title to the thing itself, or its increased value, because of the labor performed by the wrong-doer under whom he claims. While in an action of trover the value at the time of the conversion is ordinarily the criterion of damages, when the conversion has been innocently made, yet when the owner brings his action to recover his property (the thing itself), it is no answer to the action to say that when the property was taken, the defendant in good faith believed it was his, and as he has improved its condition so as to double or treble its value, the right of recovery is gone. If the doctrine contended for by the appellee in this case is sanctioned, as said by Justice COOLEY in the case of the *Royal Mining Company v. Hertin*, "what bounds can be prescribed to which the application of this doctrine can be limited?" Neither the wanton trespasser nor the party who commits an unintentional trespass can divest the owner of title under any such circumstances. The fundamental

principle "that no man can be deprived of his property without his consent, unless by operation of law," can afford but little protection if the owner is compelled to pay for the labor upon his property taken and performed without his knowledge or consent, or else the right to the possession of his property denied him, and the title vested in another. The doctrine of accession is not properly applicable to a case like this, as this generally means "accession of other materials as well as skill and labor;" and when the value is increased by skill and labor alone, it must be an extreme case that will authorize an exception from the general rule, under which the owner may recover his property so long as he can identify it. *Lampton's Ex'r v. Preston*, 1 J. J. Marsh. 459 (19 Am. Dec. 104), and *Burris v. Johnson*, id. 196.

This judgment must be reversed on both the original and cross-appeal, and the cause remanded, with directions to award a new trial, and for further proceedings consistent with this opinion.

Judgment reversed.

OWSLEY V. PHILIPS.

(78 Ky. 517.)

Negotiable instrument — ratification — promise to pay forged note.

One whose name is signed to a note as surety by another, without his knowledge or authority, is not rendered liable by his promise to the payee, after transfer, to pay it.*

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

M. H. Owsley and T. P. Hill, for appellant.

R. M. & W. O. Bradley and Hopper and John M. Phillips, for appellee.

PRYOR, C. J. This action was instituted in the Lincoln Common Pleas Court by the appellee, L. V. Phillips, against H. P. Middleton and J. S. Owsley on the following note:

* To same effect, *Shialer v. Vandike* (92 Penn. St. 447), 37 Am. Rep. 708.

Owsley v. Philips.

“\$2,150.61.

LANCASTER, Oct. 8th, 1866.

“Sixty days after date we promise to pay to the order of L. V. Philips twenty-one hundred and fifty dollars and sixty-one cents, value received, negotiable and payable at the National Bank of Lancaster, Ky.

“H. P. MIDDLETON,

“J. S. OWSLEY.”

The appellant Owsley filed a plea of *non est factum*, and upon that issue the case went to the jury. It was shown from the testimony that the name of Owsley was signed by Middleton as the surety of the latter to the note in controversy, and his authority to sign the name of the appellant being questioned, the appellee introduced proof conducing to show that Owsley, after the signing of his name to the note by Middleton, ratified that act by promising to pay the debt. It is shown by the statement of young Philips, that at the instance of his father, he saw the appellant, and was told by the latter to say to his father not to sue on the note, but to wait until Middleton's estate was wound up (the estate being insolvent), and he would pay whatever balance might remain unpaid. This statement is corroborated by the testimony of a brother of the witness, that the appellant had with him a like conversation. These conversations Owsley denies.

At the conclusion of the testimony the court, on the motion of the appellee, instructed the jury, “that although the defendant Middleton signed the name of J. S. Owsley to the note without his authority so to do, yet if they believe, from the evidence, the defendant Owsley thereafter ratified the same, or recognized it as his act and deed, they will find for the plaintiff.” An exception was taken to the instruction as given, and a verdict having been rendered for the plaintiff (appellee), the appellant prosecutes an appeal to this court.

It is not pretended that the appellant received any part of the money for which the note was executed, but his liability as the surety only is attempted to be maintained on two grounds: 1st. That he authorized the principal obligor, Middleton, to sign his name as the surety; and 2d. If no such authority was given, he became liable by the promise to pay, made after the execution of the note; that this was a ratification of the void and wrongful act of Middleton. As the law existed prior to the adoption of the General

Statutes, an authority by the appellant to Middleton, although verbal, to sign his name to the note as surety, was binding upon him, and upon that fact being established, his liability is unquestioned.

The only question necessary to be considered arises on the instruction by which the appellant is made liable as the surety, on the ground that he ratified the fraudulent act of Middleton by his agreement to pay the debt. The proof fails to show that Middleton had any general authority to sign the name of the appellee, either as principal or surety, to such obligations, and there is no evidence conducing to show that Owsley obtained any part of the money, or was in any manner deriving a benefit from the execution of the note. If the name of the appellant was placed to the note as surety without any authority from him, the act is a nullity, and no subsequent promise to pay by him amounts to a ratification or creates a liability. The contract was fully consummated: the note executed, and the money obtained by Middleton. The writing, as to Owsley, was a *nudum pactum*, and no subsequent agreement made by him to pay the debt can be enforced in the absence of a consideration to support it. The writing being void as to him when executed, his subsequent promise to pay must be treated as if his name was not upon the paper, and being without consideration, no action can be maintained against him on the promise to pay or on the original note. The relation of principal and agent never existed between Owsley and Middleton. The act done by Middleton was for his benefit alone, and if without any authority from Owsley, and from which he received no benefit, we cannot well see how the doctrine of ratification can be made to apply. An agent may commit an unauthorized act in the name of his principal, and the latter may ratify it by a partial performance of the agreement, or by accepting its benefits; or if the act was done for or in the name of the principal, he may ratify it, although no benefit is or can be derived from it.

In this case no agency existed, and the only question for the jury to try was, it being conceded that Owsley did not sign the paper, had Middleton the authority from Owsley to sign his name? and while the promise to pay by the surety, if made, cannot amount to a ratification of the void act, it is a fact that may be considered by the jury in determining the question as to the alleged authority given by Owsley to Middleton to execute the paper. Nor does the

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fact that a promise was made to pay this debt operate as an estoppel on the appellant. The appellee was not induced to part with his money by reason of any such undertaking on the part of Owsley, but the latter is really the injured party, in being compelled to resist the recovery on the ground that the writing was not his act and deed, when it must have been known to the appellee, at the time he accepted the note, that Owsley had not in person signed it. It was appellee's duty to make inquiry as to this attempted exercise of authority on the part of Middleton, and the whole question in this case is, and none other, was Middleton authorized by Owsley to sign his name to the note ?

Many reported cases may be found recognizing the principle that an act done, or contract made by one for or in the name of a party, though without any authority whatever, becomes the contract of the party if subsequently adopted and ratified by him ; and while we are not disposed to question the philosophy or wisdom of this doctrine, we cannot admit its application to the case of one who is sought to be made liable as surety on a contract made with and for the benefit of another, for no other reason than the promise to pay, when there was no legal, equitable, or moral obligation on the party to assume the debt.

Greenleaf says : " If a party, being inquired of, acknowledges his signature, without objection, this is sufficient, although it was signed without his authority." 2 Greenl. Ev. 297. This is certainly the correct doctrine, and is found in that part of his work on evidence in which he is discussing the effect of the acknowledgment and delivery of deeds. If he acknowledges the signature to be his, it is sufficient ; or if he delivers it, although his name was signed by a stranger, it is binding upon him. The receipt of the purchase-money, the delivery of the deed, all such acts would estop the grantor from asserting any claim against the grantee, although his name to the original deed may have been signed without his authority.

In the case of *Forsyth v. Bonta*, 5 Bush, 547, relied on by counsel for the appellee, there was proof conducing to show that the appellant, Forsyth, obtained the money, and it is not pretended that he was the surety only. Although the note was executed by Irvin, if Forsyth obtained the money, or as between the obligors was interested in it, we see no reason why he should not be estopped from denying the authority of Irvin to sign his name ; but the doctrine that one

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may ratify a forged instrument by a subsequent promise to pay we are not disposed to adopt, although cases may be found sustaining that view of the question. To say that one who is neither the recognized agent of, nor doing business for, another, can sign the latter's name to an obligation for money, in which he is in nowise interested, and without any authority whatever, and then make him responsible upon what is designated a ratification, and for no other reason, is, we think, a principle fraught with too much danger, even to those who engage in the ordinary business transactions of life, to be sanctioned by this court. Story on Agency, 456, 499 ; 33 Mo. ; 6 Exch. ; *Brook v. Hook*, 24 L. T. Rep. 34 ; *Workman v. Wright*, 33 Ohio St. 405 ; s. c., 31 Am. Rep. 546.

The judgment is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

 CALLAHAN V. FIRST NATIONAL BANK OF LOUISVILLE.

(78 Ky. 604.)

Negotiable instrument — transfer by maker — presumption as to indorser.

One who has acquired an indorsed note from the maker cannot recover against the indorser without alleging that the instrument was for accommodation.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Lane & Harrison, for appellant.

Lewis M. Dembitz and Rodman & Brown, for appellee.

COFER, C. J. The appellee brought this action against W. L. Weller & Son as maker, and the appellant James Callahan as indorser of a negotiable note. It was alleged in the original petition that before the maturity of the note Callahan indorsed it to the appellee; that the bank discounted it for him; that it was duly presented at maturity at the Bank of Kentucky, where it was payable, and payment demanded and refused, and regularly protested and

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notice thereof given to Callahan. Callahan denied that he indorsed the note to the appellee or that it discounted it for him. He also denied protest and notice. In an amended petition the appellee alleged that "Callahan wrote his name across the back of the note and handed it back to W. L. Weller & Son, and the note was discounted at plaintiff's bank by W. L. Weller & Son, and the proceeds of said note was carried to the credit of W. L. Weller & Son.

The law and facts were submitted to the court and judgment was rendered for the plaintiff against Callahan. From that judgment he appeals, and assigns eighteen errors, the most of which are mere heads of arguments in support of the counsel's theory of the case, and obscure rather than elucidate the real questions involved.

When the original and amended petitions are considered together the allegations are in substance these: that Weller & Son made a negotiable note payable to Callahan; that Callahan indorsed his name on the back of the note and returned it to them, and that they presented it to the appellee and had it discounted for their own benefit.

Can the bank recover against Callahan on these facts alone? We think not. The note upon its face imported an indebtedness of the makers to Callahan, but being in the makers' hands it did not import an obligation at all. Callahan's indorsement on the back of the note showed that it had been in his hands, but how or for what purpose it came again into the hands of the makers did not appear. The most reasonable conclusion is, we admit, that he indorsed it for their accommodation. This however is a mere inference of fact and not a presumption of law. The presumption of law is that it was paid and the liability of the indorser, if any had ever existed, was extinguished. *Long v. Bank of Cynthiana*, 1 Litt. 290; *Beebe v. Real Estate Bank*, 4 Ark. 546; *Bank v. Hammet*, 50 N. Y. 158.

There is nothing inconsistent with this conclusion in *Woolfolk v. Bank of America*, 10 Bush, 504; *Young v. Harris*, 14 B. Monr. 536, or *Rogers v. Poston*, 1 Metc. 643.

In each of these cases it distinctly appeared that the paper in contest was indorsed for the accommodation of the person by whom it was delivered to the holder. That fact being established, no doubt could exist as to the liability of those who had indorsed the paper and delivered it to the person intended to be accommodated, to be used by him to raise money or to take up his outstanding obligation.

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But the fact that it was indorsed for accommodation must appear by appropriate allegation, and without such allegation no cause of action can be shown, and the defect will not be cured by verdict.

That Callahan indorsed for the accommodation of Weller & Son, the note having been discounted for them, was the very foundation of the appellee's case. Unless that be shown, his obligation created by the indorsement appears to have been extinguished before the time at which the bank received the note, and it can no more recover without showing some fact to rebut the legal presumption arising from the possession of the note by the makers than if his name had not appeared on the note at all.

We perceive no valid objection to the demand, protest or notice; but for the reasons indicated the judgment is reversed and cause remanded for further proper proceedings.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

BUTLER V. SLOCOMB.

(33 La. Ann. 170.)

Negotiable instrument—liability of indorser on married woman's note.

A married woman executed a mortgage on her separate lands, acknowledging herself indebted to the defendant, and accompanying the mortgage by notes made by herself to her own order and by her indorsed in blank, with the authorization of her husband. The mortgage and notes were in fact without consideration. The defendant also indorsed the notes, and the same were transferred to an innocent holder by the maker's husband to secure his own debt. At maturity no steps were taken to fix the defendant's liability as indorser. Under Louisiana law the notes not being enforceable in the hands of the indorser, or her innocent transferees, as against the maker, *held*, that the indorser was liable thereon without such steps.

ACTION on a note. The opinion states the case. The plaintiff had judgment below.

Leovy & Kruttschnitt, for appellee.

Kennard, Howe & Prentiss, for appellant.

BERMUDEZ, C. J. The plaintiff seeks to hold the defendant responsible personally, and to subject her estate, with mortgage, to the payment of the "*mortgage note*" sued upon. It is chiefly

claimed that the defendant is liable as surety and as indorser, though the note was not protested, and that her estate is burdened with a mortgage given to secure the payment of the note, and which incumbered it when she acquired it. The defense is that the defendant is liable, neither as a surety nor as an indorser, nor otherwise, and that the mortgage claimed never had any and has no legal existence. The facts of the case are not disputed. Questions of law strictly alone are presented. There was judgment in favor of the plaintiff, and the defendant has appealed.

We take the facts as substantially represented by the defendant's counsel.

Mrs. C. A. Urquhart, wife of David Urquhart, appeared before a notary and executed an act of mortgage, in which she acknowledged being indebted to her mother, Mrs. Slocomb, the defendant herein, in the sum of \$20,000, to represent which amount she executed and indorsed four promissory notes for \$5,000 each, which were drawn to the order of and were indorsed in blank by herself. The act was executed, the notes drawn and indorsed by Mrs. Urquhart, with the authorization of her husband. Mrs. Slocomb signed the act, but no consideration passed. To secure payment of those notes Mrs. Urquhart mortgaged a piece of real estate in this city, her separate property. After the act was completed and the notes signed and indorsed by Mrs. Urquhart, Mr. Urquhart obtained on them, for his accommodation, the blank indorsement of Mrs. Slocomb, which was placed *under* Mrs. Urquhart's signature.

Afterwards Mr. Urquhart, being desirous to raise money for his own account, offered as collateral security, for his own obligation, the notes so made, signed and indorsed. Plaintiff accepted the offer, received the collaterals, and loaned the money. Mrs. Slocomb was not present at the time, nor had she any communication with plaintiff, nor did she know that he held the notes of Mrs. Urquhart, indorsed by her. When the note sued on fell due, plaintiff did not demand payment of it, nor did he have it protested, or give any notice to Mrs. Slocomb of its non-payment by the maker. In April, 1879, Mrs. Urquhart sold and transferred to Mrs. Slocomb the property described in the mortgage act, but Mrs. Slocomb did not assume payment of the notes apparently secured by mortgage on it, nor did those notes form part of the purchase price. Some two years after the maturity and non-payment of the note, plaintiff demanded payment of Mrs. Slocomb. On her refusal he brought

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this suit, for the purpose of making her personally liable on the note, and of subjecting the property to the mortgage.

[Omitting other considerations.]

The next question which arises is whether the defendant can be treated as a *surety* and if not, whether she can be held as an indorser, although the note sued on was not presented for payment at maturity and was not protested.

The view which we entertain as to the liability of Mrs. Slocomb as an indorser dispenses us from considering and determining her responsibility as a surety.

If Mrs. Slocomb were not liable as a surety she would be responsible as an endorser, although no demand of payment was made, no protest took place, and no notice was given to her.

A review of the cases adjudicated and of the opinions of commentators satisfies us that the contract of indorsement is a distinct and separate one, by which the holder of a note, having possession of it, transfers it by his signature on it, with warranty as to certain matters, and binds himself eventually to its payment.

The indorser warrants the genuineness of the note, the competency of prior parties to bind themselves in their ostensible capacities, the validity of his own title to the note, the payment of the note at maturity, and in case of non-payment, when he has reasonable grounds valid in law to believe that it will be honored, he asserts his liability to pay the same.

As an original proposition it cannot be denied, nor is it, that usually an indorser cannot be held liable in the absence of demand, protest and notice as provided by law. Such is assuredly the rule, but is it inflexible, is there no exception to it, does there exist no case in which the law admits excuses in justification of the absence of demand, protest and notice? A good deal has been written and more said on the subject, and now for the first time in this State does the question occur for solution.

In the inquiry which we are about to institute and the determination which we are to make on this vital matter, we premise that we have allowed ourselves to be guided — as the mariner is by the polar star — by the wise maxim of the law, which we deem is entitled to full application in this case, that *lex neminem cogit ad vana*. However before proceeding further, it is material that we should first settle the *character* of the indorsement of the defendant, or the note sued on.

When that note came to the hands of Mrs. Slocomb, its appearance or complexion was that of the unconditional obligation to pay money of a married woman, to her own order, signed and indorsed by herself with the authority of her husband, *for value received*.

In this last particular under the evidence in this case it was false, as no consideration had passed to her for it. It was valueless as to Mrs. Slocomb, who not having given any consideration could not prove that any had inured to her benefit, and who therefore could not enforce payment of it in case of resistance on the part of Mrs. Urquhart. It could acquire no value for the same reason in the hands of even innocent third persons, for they would likewise have been powerless to show consideration and inurement to her benefit. To acquire any *legal* and besides *real* value, the note or paper had to become the evidence of an indebtedness other than that of Mrs. Urquhart, by the act of a party competent to bind himself by his mere volition and who would be responsible in point of solvency. It was not until that act had been done that the note or paper could have been considered as the evidence of a debt which third persons could absolutely enforce. The indorsement of Mrs. Slocomb was necessary to give to the *paper* life and validity as the evidence of a debt; but that indorsement could not and did not quicken a vitality not previously existing even *in embryo*, for it was then altogether lifeless as to its maker who was also the apparent payee. The indorsement vivified it as an original evidence of a new and distinct indebtedness, binding primarily and solely upon Mrs. Slocomb as the first, and under the circumstances, the only person competent to incur an obligation. The note so signed and indorsed by Mrs. Urquhart with her husband's authority was not legally uttered, and was not binding upon her when it came to the hands of Mrs. Slocomb, nor had it been uttered when the latter indorsed it, as it was then in the possession of one who had not become the owner of it, who had given no consideration for it to the maker or to the mortgagee, and who could not enforce the payment of it. Even after it had been indorsed by Mrs. Slocomb, he himself could not under any circumstances have coerced payment of it, either against his wife or his mother-in-law, delivery to a person capable of enforcing payment being essential. 1 Dan. Neg. Inst. 56, 112; 2 id. 540; *Billgery v. Ferguson*, 30 La. Ann. 89; *Richardson v. Cramer*, 28 id. 358; *Brewer v. Gay*, 24 id. 36.

Mrs. Slocomb never legally owned the note. She indorsed it, not

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to infuse life into it as an original obligation of Mrs. Urquhart, but for the sole purpose of enabling Mr. Urquhart to use it with her valuable security, either by discounting it or using it as collateral guarantee for the payment of some obligation of his.

Under the circumstances of this exceptional case the indorsement of Mrs. Slocomb must be viewed as being as well that of the payee as an original and independent contract, whereby she bound herself primarily to its payment. In either case would she be bound. Dealing with her then as with the original payee and indorser, let us consider whether she can set up as a valid defense, want of demand, protest and notice at maturity.

There can be no doubt that in its technical sense, indorsement means, writing one's name, with the intent to incur the liability of a party who warrants payment of the obligation, provided it be duly presented to the principal at maturity, and remain unpaid by him, and that these facts be seasonably signified to the indorser, the indorser affirming and warranting that the original parties to the note were competent to bind themselves in their ostensible capacity, otherwise they would not be real parties to it. Therefore it is, that if the drawer, acceptor or maker be an infant, a lunatic, or a married woman unauthorized to act and not liable, the indorser's affirmance or warranty is broken, and he can be sued either upon the instrument itself, without proof of demand and notice, or for the recovery of the original consideration which has failed. When there is in such a case no principal party legally bound upon the note, both presentment and notice are superfluous and can therefore well be dispensed with. Hence also when the note is void between the drawer and payee on account of an illegal consideration, the indorser may be held without any proof of demand and notice; when he indorses such note, the indorser warrants by the very act that the drawer is legally liable to pay it, and practices a deception for which he is responsible, knowing, as he necessarily must, that such is not the case. The holder in the belief of its truth might look only to the maker, and fail to take the necessary steps to charge the indorser, and if when he becomes aware that the maker was not legally bound for it he could not recover against the indorser—the latter would be protected by his own fraud and the holder suffer by the confidence placed in him!

So say, almost *verbatim*, the writers on negotiable instruments, and such is the jurisprudence on which the doctrine is based.

Besides, the principal excuses to justify absence of demand and consequently of protest and notice, can be classed under two distinct heads: 1st, the impossibility of a demand; 2d, the acts, words or position of a party showing that he has abandoned the right, or was not entitled to the demand, of the want of which he seeks to take advantage.

How far death, absence, insolvency and other accidental circumstances may justify the absence of demand, protest and notice, because of the impossibility of making any, has been extensively considered and treated by authors and expounded by jurisprudence, but as the inquiry is not presented in this case we will not enter upon it. The excuse for want of demand being offered on a different ground, we will now proceed to consider its sufficiency.

The payee may have waived demand, protest and notice, and in such a case he clearly could not plead the absence of such in bar to recovery against him, but where he has made no such waiver, he is entitled to the fulfillment of those formalities, provided he be in a position to require them, provided by their non-fulfillment he has been deprived of rights which he otherwise would have enjoyed. The authorities are numerous to that effect.

But in this case Mrs. Slocomb was not in a position to demand the observance of those ceremonies, and by their non-fulfillment she has lost no right which she otherwise would have possessed, for under no imaginable circumstance was she entitled to any against Mrs. Urquhart.

The reasons for this are obvious. She had no right to put in circulation, as a valid obligation, a note which she knew was, as to her, radically void, and which, under the evidence in this case, had been made to her knowledge by a married woman, not for her own benefit, but for the advantage of her husband, in derogation of a prohibitory law, and next, she knew that she could have no action against the maker, in case of non-payment, as that maker was under no obligation, legal or moral, to pay the same to her, and she was also aware that she had no reasonable ground, nay, no right whatever, to expect payment of it by her. The demand, protest and notice, had any taken place, could have conferred on her no right whatever against the drawer, and the absence or want of the same has taken none away from her. She has therefore no valid cause of complaint on account of their omission, and is amenable and chargeable for the debt pressed against her.

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This view of the case is in full accord with the jurisprudence, and consonant with the teachings of commentators on the subject, predicated, as they are, on commercial usages and customs, long established and respected, both in England and in this country.

We will not assume to quote particularly the authorities upon which we rely to justify our conclusions. We deem a collective reference to the main ones sufficient, without mentioning specially the language used in any one case, as in the course of this opinion we have copiously made the sayings of others our own, with some modifications to suit our views. 1 Dan. Neg. Inst. 536; 2 id. 142, 143, §§ 1112, 1113; 1 Pars. on Bills, 353; 442-445, 463, 464, 532, 536 and note; 559, 560; Edw. on Bills, 290, and the authorities substantially quoted in the notes. See also *Copp v. McDugall*, 9 Mass. 1; *Cundy v. Marnott*, 1 B. and A. 696; *Farmers' Bank v. Vanmeter*, 4 Rand. 557, 558; *Erum v. Downs*, 15 N. Y. 575; *Dalrymple v. Hillenbrand*, 2 Hun, 488; also authorities collected in H. D. 1, p. 178; (2) No. 3; *Duperier v. Darby*, 25 La. Ann. 477; *Succession of Weil*, 24 id. 139; *Crane v. Trudeau*, 19 id. 307.

The judgment of the lower court was entirely in favor of plaintiff, recognizing the validity of the mortgage, allowing attorney's fees under the act, for the prosecution of the suit for the payment of the note sued on. It is erroneous except so far as it allows the face of the note with the interest stipulated.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, so far as it allows plaintiff \$5,000 with eight per cent interest per annum from February 8, 1876, until paid, and costs of suit be affirmed; and that in all other respects it be avoided and reversed.

It is further ordered that as regards the claim of plaintiff to a mortgage and attorney's fees, plaintiff's petition be rejected with judgment in favor of the defendant.

It is further ordered that the plaintiff pay the costs of the lower court, and that he and the defendant pay the costs of appeal, share alike, from the date of appeal.

So ordered.

HARRISON V. CITY OF NEW ORLEANS.

(33 La. Ann. 222.)

Municipal corporation — injunction against passing ordinance.

A city may not be enjoined from passing an ordinance.

SUIT for injunction. The opinion states the case. The defendant had judgment below.

W. S. Benedict, for appellants.

Kennard, Howe & Prentiss, for appellee. .

TODD, J. The plaintiff sued out an injunction against the mayor and administrators of the city of New Orleans and common council thereof to restrain them from passing or voting upon any ordinance “concerning the right of way to the New Orleans Pacific Railroad Company, or any company to lay or erect tracks upon Thalia street, from Claiborne street to the levee, or authorizing said tracks to be laid in said streets.” The defendants excepted on the ground that the petition disclosed no cause of action, which exception was sustained, the suit dismissed and injunction dissolved. From this judgment the plaintiffs have appealed.

The judgment of the court *a qua* is correct. In a recent case decided by this court, *Slaughterhouse Co. v. Police Jury of Jefferson*, Opinion Book 53, folio 546, we held that no injunction would lie to restrain a municipal corporation from passing or voting on any ordinance. In fact this principle is elementary. Municipal corporations are clothed with legislative power to be exercised according to their discretion with reference to all subjects pertaining to their administrative functions. To allow them to be impeded or restrained in the exercise of these powers at the will or caprice of anyone who may believe that such or such act or ordinance might prove injurious to him, would interfere seriously with and completely disarrange the administration of the government of a city or other municipal corporation.

Besides injunctions are designed or intended to prevent actual or impending injuries, and prohibit acts from which such injury, loss or damage must inevitably result.

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In this case *non constat* that the city will ever pass the apprehended ordinance. If it is passed, *non constat* that the railroad company or companies will ever accept its terms or exercise the privilege or franchise granted.

The mere voting on or passing the ordinance in question cannot *per se* do the plaintiff any possible injury. It will be time enough to complain, if it be a subject for complaint, when steps are taken or a beginning made to put the ordinance into actual execution.

The judgment appealed from is affirmed with costs.

Judgment affirmed.

CITY OF NEW ORLEANS V. DUBARRY.

(33 La. Ann. 481)

Constitutional law — equality of taxation.

A license fee may be exacted by a city from keepers of private markets, although none is imposed on persons selling the like articles in the public markets of the city.

SUIT for a license fee. The opinion states the case. The defendant had judgment below.

S. P. Blanc, assistant city attorney, and *Denegre & Stauffer*, for appellant.

Simeon Belden, for appellee.

TODD, J. The city of New Orleans sues to recover of the defendant the sum of \$300, the amount of a license tax claimed to be due by him as the keeper of a private market. The defense is that the city ordinance imposing this license is in violation of that clause of the Constitution requiring taxation to be equal and uniform. There was judgment for the defendant and the city has appealed.

The tax or license is resisted on the ground that market men selling meat, vegetables, etc., in the public markets of the city are not required to pay a license, whilst those conducting private markets in which the same articles are sold, are required to pay the license in question.

The city of New Orleans has power in its discretion to tax all trades and callings save those that are specially exempted. This

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conceded, taxation under the Constitution must be uniform, but it need not be universal. That is, upon every distinct trade, calling or occupation not exempted, a license may be required. But the city may exercise this power upon certain objects and callings, and may ignore and so exempt others from its operation. Certain occupations may be taxed for a greater amount, and others for a less, and to that end the city may divide occupations and callings into several classes, and impose a different tax upon each class; but upon all objects of taxation in the same class there must be equality. *State v. Poydras*, 9 La. Ann. 165; *State v. Lathrop*, 10 id. 402.

Upon this point we read in Cooley on Taxation, 128, as follows: "It has already been stated that inequality does not necessarily follow the restricting to a few subjects only or to a single subject. A license tax cannot be deemed unequal because reaching one occupation only, if it is to reach all who follow that. Let it reach all of a class either of persons or things, whether they reside in any particular locality, or are scattered all over the State."

In further illustration of this principle, we find in the case of *Kaliski v. Grady*, 25 La. Ann. 576, it was shown that a tax of \$50 was levied upon dealers in spirituous liquors on steamboats, and \$85 on persons carrying on the same business on land, and it was held constitutional.

And in the case of *New Orleans v. Kaufman*, 29 La. Ann. 283, the keeper of a junk store, where iron, paper, rags, cordage, etc., were sold, was adjudged to pay a license of \$250, though it was shown that the ordinary dealers in merchandise including those articles were charged a much lower license.

Applying these principles to this case, the question arises, do the keepers of the private markets and those selling meats, vegetables, fish, etc., in the public markets, follow the same occupation and calling, and is that occupation and calling so completely the same that those pursuing them respectively cannot be separated and classified, and the one class subjected to a license and the other exempted from any tax whatever? And this is the question for our solution.

The city of New Orleans for the convenience of its citizens has erected public markets in various localities in the city. The buildings are large and commodious and erected at great expense. In their construction it was designed not only to provide for the wants of the citizens, but also to construct them in such a manner as to

adapt them fully to the purposes for which they were intended, and at the same time in their peculiar construction to fit them to be used without detriment to the public health.

Further, to promote these objects, these public markets have been subjected to peculiar police regulations. Thus these markets are required to be opened and closed at certain hours. They are also divided into different departments or sections, so to speak. One in which meat is sold exclusively; another, fish; another, vegetables; and so on. Not only this, but they are further subdivided into stalls, and it is required that only one article or commodity can be sold in each stall. This division and subdivision subserves a double purpose, the convenience of the tax payers, and chiefly, the facility that is thus offered for a thorough inspection on the part of the officers provided to that end by the city government.

Do the private markets, equally with the public markets, present all these conditions, restrictions and advantages? The evidence satisfies us that they do not.

In the first place, the buildings in which these private markets are kept are owned or leased by those keeping them. They have not been constructed with any view to the business for which they are used, but are mere ordinary buildings. And the testimony in the record shows that they cannot be as easily and effectually subjected to the proper sanitary regulations as the public markets, to promote cleanliness and the soundness and preservation of the articles sold.

Besides, all the various articles which are sold in these private markets are not offered for sale on separate stalls or apartments as in the public markets, but we find that all such commodities as meat, poultry, fish, game, fruit, vegetables, etc., are kept exposed for sale in the same room, altogether. They are, it is true, subject to be regulated by rules established by the city authorities, but in fact, whatever regulations may be made for them, they cannot, in the very nature of things, be subjected to the same regulations provided for the public markets, nor are they as favorable for that prompt and complete inspection which the public markets afford, and which offers the main protection to the public health.

We can realize more readily the difference between them were we to suppose for a moment that the public markets were closed and abolished, and the sole reliance of the citizens were on the private markets to supply them with all these commodities for daily use.

We can easily see what injurious consequences would result to the convenience of the citizens, and to the police, good government and health of the city.

With these differences between the two kinds of markets, and with all these advantages in favor of the public markets, we deem it sound policy and the exercise of a wise discretion on the part of the city to encourage all who desire to sell their commodities to occupy the public markets provided by the city; and that there is that difference in the conditions of the business, the mode and method of it as pursued in the two markets, to justify the city in treating these market men as comprising two distinct classes of dealers, and discriminating between them by licensing the one and indirectly exempting the other.

Courts of justice will not interfere with the administration of the revenue laws, State or municipal, and strike those laws with nullity unless they are in plain violation of the Constitution. No system of revenue or taxation devised by human wisdom has ever been found in its practical operation to bear equally upon all and to meet the exact theoretical standard of equality and uniformity. If it substantially meets these constitutional requirements, and in its spirit and intendment conforms thereto, it is all that can be expected or required.

It is proper to say that no other question than the one discussed is presented by the record. The case was argued and has been considered solely with reference to the provisions of the Constitution of 1868, since the ordinance complained of was passed whilst that Constitution was in force.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and proceeding to render such judgment as should have been rendered by the court below, it is ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of three hundred dollars, the amount of the license in question, with the interest as prayed for from the first of March, 1879, and that the privilege and right of pledge claimed be recognized and made executory, and the injunction issued prohibiting the defendant from pursuing his occupation as the keeper of a private market till the payment of the license be made perpetual, defendant to pay costs of both courts.

Rehearing refused.

Justice POCHE takes no part in this case.

Stockton v. Fireman's Insurance Company.

STOCKTON V. FIREMAN'S INSURANCE COMPANY.

(33 La. Ann. 577.)

Insurance — fire — agent — power to bind company.

An insurance agent, with power to solicit, receive and report, applications, has no power to accept them, or to bind his company by stating that the risk attached at a certain moment.*

ACTION on an oral contract of insurance. The opinion states the case. The defendant had judgment below.

Hornor & Benedict and *F. W. Baker*, for appellant.

Broughn, Buck & Dinkelspiel, for appellees :

FENNER, J. This is a suit upon an alleged contract of insurance, which plaintiff claims to have been formed with defendant by reason of the following facts, viz.:

Plaintiff, on March 13, 1875, was solicited by H. D. Hill, a general insurance agent and solicitor, who had authority to solicit for defendant as well as other companies, to insure his stock in trade and machinery in the Firemen's Insurance Company. Upon asking the rate of insurance, Hill sent to him the inspector of the company, who, after examination, stated the rate would be two and a half, or three per cent. Plaintiff said he would not pay that rate, but would give two per cent ; to which the inspector replied that he would report to the company and let him know.

The inspector saw the president who said, " he thought probably he could take it at two per cent ; " and the next day, he reported to plaintiff that this rate would be accepted. Thereupon, on the 17th of March, Hill, the original solicitor, called and prepared an application for the insurance, upon the machinery in the sum of \$1,500, upon the stock in the sum of \$1,000, and upon three mules in the sum of \$300, at a premium of two per cent per annum for one year, commencing March 17, 1875, at 12 o'clock M. This application was signed by plaintiff, and delivered to Hill, who stated to him that the risk attached from noon of that day, March 17; Hill did not present the application to the company until the next day

* See *Critchett v. Am. Ins. Co.* (53 Iowa, 204), 36 Am. Rep. 230.

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at 9:45 A. M., and in the intervening night the property had been destroyed by fire, to the knowledge of both Hill and the company at the moment when the application was presented. Of course it was rejected by the company.

The evidence conclusively establishes that Hill had no authority to bind the company in any way. The limit of his authority, if such it can be called, was the permission granted to him by the company to solicit and receive applications for insurance, which were to be presented by him to the company, and after reference of the same to the inspector of the company, and proper consideration, he would be informed as to whether they were accepted or rejected, and if accepted, he would be entitled to a certain commission on the premium.

From this it follows that the mere statement made by Hill to plaintiff, on receiving the latter's application for insurance, that the risk would immediately attach, was without any binding force on the company.

Counsel for plaintiff seeks to evade this conclusion by sheltering his case under the principle that an agent, clothed with authority to represent his principal in some official capacity, is clothed with authority to bind him as to third persons in all matters within the scope of the apparent and usual authority generally attaching to such employment, and that third persons are not bound to inquire as to special limitations on such usual and apparent authority, which may exist in particular cases.

He has referred us to several cases in which, in matters of insurance, this doctrine has been applied, under particular circumstances, to acts of officers, of general agents, and of local agents representing insurance companies at places distant from their corporate domiciles. For convenience in the transaction of business, such agents are frequently, perhaps generally, invested with powers of making binding contracts for their principals, and are furnished with policy blanks for that purpose, and persons dealing with them have rightful claim to suppose that they have the necessary powers usually accorded. He refers us however to no case where the principle has been extended to mere local solicitors of resident companies. Such solicitors are not ordinarily vested with authority to consummate contracts, and considering the dangers of such delegation and the absence of all necessity therefor, there seems to be no good reason why they should be, or why any person should suppose them to be,

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clothed with such power. We are constrained to conclude that the power of Hill to bind the defendant must be limited to the terms of his mandate, and that if plaintiff has been deceived by placing imprudent trust in him, he must bear the consequences.

[Omitting a minor consideration.]

For these reasons, it is ordered, adjudged and decreed that the judgment appealed from be affirmed at appellant's costs.

CITY OF NEW ORLEANS V. ECLIPSE TOW-BOAT COMPANY.

(23 La. Ann. 647.)

Constitutional law — tonnage duty — regulation of commerce.

A city ordinance requiring a license fee from owners of tow-boats running on the Mississippi river to and from the Gulf of Mexico, does not impose a duty on tonnage, and is not a regulation of commerce, and is therefore not unconstitutional.

SUIT for license fee. The opinion states the case. The plaintiff had judgment below.

S. P. Blanc, assistant city attorney, for appellee.

T. Gilmore & Sons, for appellant.

Todd, J. The city of New Orleans sues defendant for the amount of a license tax (\$500), with interest and costs for the year 1880, imposed by ordinance of the city council of the 23d of December, 1879, upon "every member of a firm or company, every agency, person or corporation owning and running tow-boats to and from the Gulf of Mexico." The defendant company is the owner of tow-boats which are enrolled and licensed for the coasting trade pursuant to acts of Congress, and employed in towing vessels between the city of New Orleans and the gulf. The grounds of defense are:

1st. That the license tax in question is a duty upon tonnage and a regulation of commerce, and that the ordinance imposing it is therefore in violation of art. I, § 8, par. 3 of the Constitution of the United States, which provides that Congress shall have power

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“to regulate commerce with foreign nations and among the several States and with the Indian Tribes,” and also § 10, par. 3 of the same article, which declares that no State “shall without the consent of Congress lay any duty on tonnage.”

2d. That it is violative of the State Constitution, because the tax is not equal and uniform, nor imposed in accordance with the limitations therein prescribed.

From a judgment in favor of the city the defendant has appealed.

The right of a man to the use of his property, or to pursue any legitimate calling or occupation, may be regarded as an inherent right not derived from any positive legislation. The protection afforded by a government to the enjoyment of the right imposes the obligation on the citizen to contribute to the support of such government, and authorizes the imposition of taxes as the equivalent for the protection thus afforded. The objects of taxation under our present and former Constitutions have been property, income and occupations. The tax upon occupations is termed a license tax to distinguish it from the tax on property.

This power to tax for the support of the government is one of the chief attributes of sovereignty; and this power on the part of the State extends over all objects embraced within its sovereignty, subject only to such limitations as the State may prescribe for itself or to the inhibitions of the Federal Constitution. *Nathan v. Louisiana*, 8 How. 73; *McCulloch v. Maryland*, 4 Wheat. 429; *Brown v. Same*, 12 id. 419; *Transportation Co. v. Wheeling*, 9 Otto, 273.*

This being an acknowledged right of a State, any restriction of it by the only supreme authority to which it is subject, the Constitution of the United States, must be shown by the express language of that instrument or result from the clearest implication.

There seems no necessary connection between this power of taxation in a State, and the language of the Federal Constitution invoked as a limitation on that power; and we have high authority for holding that the framers of that instrument did not construe the clause referred to as bearing upon the subject of this power. We read in the *Federalist*, which is regarded by the highest judicial tribunals as important authority on the subject of constitutional construction, and the production of Mr. Hamilton, who was disposed to construe liberally the powers of the general government, as follows: “That the States would possess an independent and un-

* Reported below, 9 W. Va. 170; s. c., 27 Am. Rep. 552.

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controllable authority to raise their own revenue for the supply of their own wants ; and with the single exception of duties on imports and exports, would, under the plan of the Constitution, retain that authority in the most absolute and unqualified sense. And that an attempt on the part of the general government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause in the Constitution." Federalist, No. 32.

And in the *Passenger* cases, 7 How. 283, the Supreme Court of the United States, through its organ, Chief Justice TANEY, held : "That though a ship, when engaged in the transportation of passengers, is a vehicle of commerce, and within the power of regulation granted to Congress, yet it has always been held that the power to regulate commerce, as conferred, does not give to Congress the power to tax the ship, nor prohibit the State from taxing it as the property of the owner, when he resides within their own jurisdiction.

That the authority of Congress to tax ships is derived from the express grant of power in the eighth section of the first article, to tax and collect taxes, duties, imports and excises ; and that the inability of the States to tax the ship, as an instrument of commerce, arises from the express prohibition contained in the tenth section of the same article." The tenth section referred to, being that clause which prohibits the States from laying any imposts or duties on imports or exports except what may be necessary for executing its inspection laws.

In the case of *Transportation Co. v. Wheeling*, 9 Otto, 273, Mr. Justice CLIFFORD, as the organ of the court, after referring to the extract from the Federalist quoted above, and speaking of the Federalist as ever having been regarded as entitled to weight in any discussion as to the true intent and meaning of the provisions of the fundamental law, proceeds as follows : "From which it follows, if the writer of that publication is correct, that the power granted to regulate commerce did not prohibit the States from laying import duties upon merchandise imported from foreign countries ; that the commercial clause (*i. e.* the clause invoked against the license in this case) does not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the power to regulate commerce ; and that the right of taxation in the States remains over every subject where it before existed with the exception only of those expressly or impliedly prohibited."

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These he mentions as the only prohibitions, those denying to a State to levy duties on imports or exports, except such as are absolutely necessary for executing its inspection laws and to levy any duty on tonnage without the consent of Congress.

In harmony with these decisions, it has been held that steamboats, ships, ferry-boats, etc., are liable to taxation, as property, at their home ports. *Minturn v. Hays*, 2 Cal. 590; *City of St. Joseph v. Han. & St. J. R. Co.*, 39 Mo. 460; *New Albany v. Meekin*, 3 Ind. 481; *Battle v. Mobile*, 9 Ala. 234; *People v. Com'rs of Taxes*, 48 Barb. 157; *Morgan v. Parham*, 16 Wall. 472; *Hays v. Pacific M. S. Co.*, 17 How. 596.*

“A State tax, which remotely affects the efficient exercise of a Federal power, is not for that reason alone prohibited.” *Railroad Company v. Peniston*, 18 Wall. 5.

“A State may impose a tax upon the capital of a corporation created by it, although the corporation is created for the purpose of towing vessels and carrying freight and passengers.” Such is the express language of the Supreme Court of this State in the case of *Union Tow-Boat Company v. Bordelon*, 7 La. Ann. 192. And in the course of his opinion, Mr. Justice PRESTON, as the organ of the court, well remarked: “It is said that the tax is a regulation of commerce and conflicts with the power of Congress to regulate commerce with foreign nations, and among the several States. *

* * We cannot conceive that a question can arise under the article of the Constitution of the United States quoted. All taxation upon property within one State may remotely affect its commerce with a sister State. Thus, a tax upon stores may increase the price of merchandise brought here by merchants from abroad; a tax upon warehouses, the price of storage of produce from the western States, and a tax upon our markets may enhance the price or perhaps curtail the quantity of supplies brought to them. Yet these taxes have never been questioned.” See also, 11 Mich. 43; 8 Ohio, 521; 48 Barb. 157.

And as more closely analogous to the case at bar, it has been held “that a State law requiring every express company or railroad company having a business extending beyond the limits of a State to take out a license is valid, for it is a tax on the business of making contracts within the State for transportation beyond it.” *Osborne v. Mobile*, 16 Wall. 479; *State Tax on Railway G. Receipts*, 15 id.

* See *Irvin v. N. O., St. L., and O. R. Co.*, 94 Ill. 105; a. c., 34 Am. Rep. 208.

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293 ; *South'n Ex. Co. v. Mayor*, 49 Ala. 404 ; *Delaware Railroad Tax*, 18 Wall. 208.

Upon a question of so much importance, and one which has so largely occupied the attention of courts distinguished for their learning and ability, and been so extensively discussed, we prefer simply to cite the authorities which must command respect rather than to elaborate our own views. It suffices that we state our conclusion on this point from a mature consideration of them, and which is that there is nothing in the clause of the Federal Constitution referred to giving Congress the power to regulate commerce with foreign nations or between the States, that is infringed by the ordinance in question, imposing the license assailed; and it would only be by a strained and narrow construction that any conflict or even any direct relation between the two could be discovered.

II. Nor can the license be properly regarded as a duty on tonnage, which is made the second ground of attack. We have shown by the authority cited that a State can levy a tax directly on a ship as property, although it may be engaged in commerce. This seems to us to be more like a direct duty on tonnage than the mere imposition of a license on a company using such vessels in their business. Besides, the very meaning of the term of itself shows that this prohibition has no direct bearing or pertinency to the question at issue.

Cooley says: "Duties on tonnage the States are forbidden to levy; the meaning of the prohibition seems to be that vessels must not be taxed as vehicles of commerce, according to capacity, it being admitted that they may be taxed like other property." Cooley Const. Lim. (4th ed.) 606.

III. It is urged also that the license and enrollment of the vessels belonging to this company under the Federal laws deprive any inferior authority of the power to exact a license for the use of such vessel in their business.

The authorities do not sustain this position, but on the contrary are in direct opposition to it. Burr. on Tax. 149, 155; 16 Gratt. 139; 18 How. 71; 16 B. Monr. 699; 1 Black. 603; 5 Wall. 475.

IV. In regard to the alleged conflict between this ordinance and the State Constitution, it suffices to say that this question was before us in the case of *Vergnole v. City of New Orleans*, 33 La. Ann. 35, which was a suit to enforce the payment of a license imposed by the city council at the same time, and where the same ground

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of nullity was set up, and in that case we held for the reasons therein assigned that there was no provision of the State Constitution that rendered the license or the ordinance imposing it void. We adhere to that ruling.

This disposes of all the issues presented by the pleadings in the case, and finding no error in the judgment appealed from, the same is affirmed with costs.

Rehearing refused.

Judgment affirmed.

BROWN V. HOUSTON.

(33 La. Ann. 843.)

Constitutional law — taxation of products of other States.

A tax imposed by the State of Louisiana on coal brought there from Pennsylvania for sale, is not unconstitutional as impairing the immunities and privileges of citizens of Pennsylvania, as a regulation of commerce, or as levying a duty on an import.

INJUNCTION restraining a tax collector from selling a lot of coal for taxes. The opinion states the case. The injunction was dissolved below.

Joseph P. Hornor and Francis W. Baker, for appellants.

Whitaker & Adams, for appellee.

TODD, J. The plaintiffs are appellants from a judgment of the Civil District Court of the parish of Orleans dissolving their injunction, taken out to restrain the tax collector from selling a lot of coal for taxes.

The coal was mined in Pennsylvania, was brought into this State for sale, and was duly assessed as the property of the plaintiff within the territorial limits of the district where the defendant was tax collector, and where the coal was kept for sale.

The tax is resisted upon the ground that it was imposed in violation of the provisions of the Constitution of the United States, which declares:

1. The citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States.

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2. Congress shall have power to regulate commerce with foreign powers and among the several States.

3. No State shall levy any imposts or duties on imports or exports.

First. Act 77 of 1880, under which the tax complained of was levied, provides that "annual taxes, amounting in the aggregate to six mills on the dollar of assessed valuation hereafter to be made, of all property situated within the State of Louisiana, except such as is expressly exempted from taxation by the Constitution, shall be collected," etc.

This act does not in its terms discriminate against the products of other States, or the property of the citizens of other States, but subjects all property liable to taxation found within the State, whether of its own citizens or citizens of other States, whether imported from other States or produced here, to the same rate of taxation.

If the law exempted property of the citizens of other States, brought into the State for sale, from taxation, and at the same time levied a tax on the products of the State, it would in fact show a discrimination against the citizens of the State and the products of the State.

We discover no force whatever in this ground of opposition.

Second. The coal in question was taxed in common with all other property found within the State. We held in the case of the *City of New Orleans v. Eclipse Tow-Boat Company*, 33 La. Ann. 647,* that the clause in the Federal Constitution giving to Congress the power to regulate commerce with foreign nations and among the States, had no immediate relation to or necessary connection with the taxing power of a State. Every tax upon property, it is true, may affect more or less the operations of commerce by diminishing the profits to be derived from the subjects of commerce; but it does not for that reason amount to a regulation of commerce within the meaning of the Federal Constitution, and such is the doctrine laid down by the Supreme Court of the United States. 15 Wall. 293.

So it has been held that "a tax on property that may be the subject of commerce under congressional regulations is not a tax on commerce. Neither is a tax on property which has been the subject of such commerce, where it is taxed only as property and in com-

* *Ante*, 279.

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mon with all other property within the State." Cooley on Taxation, 62, 63 ; *Brown v. State*, 12 Wheat. 419, 437 ; *Waring v. Mayor*, 8 Wall. 110 ; *Perveer v. The Commonwealth*, 5 id. 475, 479.

The power of taxation exercised by the State with respect to the property in question does not in the remotest degree directly or indirectly, infringe upon this constitutional provision relating to the regulation of commerce.

Third. This tax cannot be regarded as a duty or impost levied by the State on imports. To give such construction to it and to recognize the alleged prohibition contended for, would create an exemption for all goods and merchandise, and property of every kind and description brought into the State for sale or use, and by such construction destroy a main source of revenue to the State.

As we had occasion to show in the case referred to, the word "imports" used in the Constitution, has been construed to apply not to property brought or imported from other States of the Union, but solely to imports from foreign countries. *Woodruff v. Parham*, 8 Wall. 123 ; 5 id. 479. And in the case of *Woodruff v. Parham*, it was expressly held that a uniform tax imposed by a State on all sales made in it, whether made by a citizen of such State or another State, and whether the property sold was the product of that State or another, was valid. And in the opinion rendered in that case, the right of a State to tax the property itself brought to such State for sale from another, was distinctly recognized and broadly stated.

Cooley, in his work on Taxation, states the same doctrine in these words : "The Federal Constitution provides that no State shall, without consent of Congress, lay any imposts or duties on imports or exports, except what may be necessary for executing its inspection laws. But this provision has no application to articles transported merely from one State to another."

We find no error in the judgment appealed from, and it is therefore affirmed with costs.

INSURANCE OIL TANK COMPANY V. SCOTT.

(88 La. Ann. 946.)

Trade-mark — "insurance oil."

"Insurance oil" is a valid trade-mark for an illuminating non explosive oil.
(See note, p. 290.)

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SUIT to enjoin infringement of a trade-mark. The opinion states the case. The injunction was refused below.

Leovy & Kruttschnitt, for appellant.

Chas. S. Rice, for appellee.

FENNER, J. The evidence establishes, that prior to 1873, most of the illuminating oils produced from petroleum, then in the market, were of low fire-test, and consequently inflammable, and also generated vapors which, in certain combinations with atmospheric air, liable to take place, became explosive and frequently caused destruction to life and property. Other oils, then in use, not inflammable or explosive, were deficient in illuminating or other qualities requisite to fit them for domestic use in ordinary lamps. There existed an urgent public demand for an illuminating oil of this character, combining, with perfect safety, the other necessary qualities for family use. With the view of supplying this demand, plaintiff instituted negotiations with certain oil refiners in Cleveland, Ohio, for the purpose of securing the production of an illuminating oil, having certain desiderated qualities as to color, specific gravity, flashing point, and fire-test.

Plaintiff succeeded, in 1873, in procuring an oil, manufactured for it and under its orders, possessing the required qualities, which after examination secured the public approval and recommendation of the board of health of this State and of the insurance companies of New Orleans and of other cities. To this oil plaintiff gave the name "Insurance Oil," and adopted that name as its "trade-mark," under which it sold this particular oil, to distinguish it, not only from other different oils, but also from all oils sold by others than itself. Application was made, under the act of Congress, to the U. S. Patent Office for the registry of this trade-mark, and after due examination, the commissioner made the registry and issued the certificate. Plaintiff had made, and used, a stencil-plate containing the words: "Trade-mark Insurance Oil, Pat. Jan. 5, 1875," cut in letters of peculiar form and character and accompanied with certain distinctive scroll-work, with which it branded the packages containing this oil and sold by it.

Owing to the character of the oil and aided by active and expensive canvassing and advertising, plaintiff succeeded in establishing

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an extensive trade in this and contiguous States, profitable to itself and advantageous to the public — the evidence showing that no accident has ever occurred from the use of this “insurance oil.”

The defendant, a rival dealer in oils in this city, after the reputation of plaintiff’s oil had been thus established, commenced putting up and selling oils dealt in by him, as “Insurance Oil,” and had made a stencil-plate, the *fac-simile* of that used by plaintiff, with which he caused his own packages to be branded and put upon the market.

Plaintiff brought the present suit to restrain, by injunction, the infringement of its trade-mark and to recover damages.

The defenses, interposed by exceptions and answer, are manifold, and will be considered in order.

[Omitting minor considerations.]

Objection is made that the words “Insurance Oil” are not a legal trade-mark, because the word “insurance” merely denotes the description or quality of the article, without in any manner indicating origin or ownership.

The law on this subject is tersely expounded by Judge COOLEY: “In general, a man may adopt for a trade-mark whatever he chooses; but when he asserts, and seeks to enforce, exclusive right therein, it becomes necessary to ascertain whether it is just to others that this be permitted. If the name, device or designation is purely arbitrary or fanciful, and has been first brought into use by him, his right to the exclusive use of it is unquestionable. But the mere designation of a quality, as ‘nourishing’ applied to an article of drink, cannot be appropriated as a trade-mark; neither can any general description, by words in common use, of a kind of article, or of its nature or qualities.” The defendant contends that the trade-mark is defective, 1st, because the word insurance, as applied to an illuminating oil, merely denotes the quality of safety, and may therefore be used by a vendor of any safe oil; 2d, that it indicates that the oil has been approved by insurance companies, and so may be employed as applicable to any oil having such approval. The learned judge of the court *a qua* sustained the defendant on these points and rejected plaintiff’s demand.

We cannot agree with our brother of the District Court. While the word insurance may, by some process of association of ideas, suggest the notion of safety, it is not synonymous with safe, nor can it be said to describe any possible quality of oil. The word is a noun

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substantive, not grammatically applicable to the description of the qualities of things. The dictionary furnishes several examples of its use as part of compound words, such as insurance-broker, insurance-clerk, insurance-company, insurance-office, insurance-policy—all of which have well-understood meanings; but insurance-oil is in itself meaningless, conveying no rational idea, any more than would the words, insurance-house, or insurance-tree.

Equally untenable is the idea that these words signify that the oil has been recommended by insurance companies. That the selection of this name was suggested by the fact that it had received such approval, is admitted: but that the words express such a fact cannot be maintained.

We are strengthened in our conclusion by the decision of the commissioner of patents in admitting this trade-mark to registry. The authorities of the patent office, from long experience, are familiar with the law of trade-marks, and their decisions, though not conclusive, are entitled to great consideration by courts in the determination of such questions.

5th. It is urged that the trade-mark is defective because not indicating the origin or ownership of the article.

There are authorities holding that it is essential to the validity of a trade-mark that it should indicate the name or address of the manufacturer or seller of the articles, in such manner as to distinguish them as the goods made or sold by the parties claiming the benefit thereof.

We consider however that the latest and best authorities establish that such particular designation is not essential; but that when a particular form of words or device, otherwise valid as a trade-mark, has been first employed by a particular maker or seller, and has been used by him upon his goods, so long and so exclusively as to have acquired, by association, an understood reference to such maker or seller as the originator or seller of articles so marked,—this will be a sufficient compliance with the law, and will entitle the party to protection.

Browne on Trade-Marks, §§ 150, 151; *Charter Oak* case, 44 Mo. 173; *Congress & E. Spring Co. v. High Rock Co.*, 57 Barb. 526; *Boardman v. Meriden B. Co.*, 35 Conn. 402; *Canal Co. v. Clark*, 13 Wall. 322; *Burnett v. Phalon*, 3 Keyes, 594.

The evidence brings the case of plaintiff within the principle of these authorities.

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[Minor matters omitted.]

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided and reversed ; and it is now adjudged and decreed that the original injunction herein issued be reinstated and made perpetual, and that plaintiff's demand in damages be dismissed as in case of nonsuit, defendant and appellee to pay costs in both courts.

Rehearing refused.

NOTE BY THE REPORTER.—In *Larabee v. Lewis*, Supreme Court of Georgia, January 17, 1882, it was held that ' Snowflake,' as applied to bread or crackers, is a mere description of whiteness, lightness, and purity, and is not a valid trade-mark. The court said. 'A trade-mark is defined to be the name, symbol, figure, letter, form, or device, used by a manufacturer or merchant to designate the goods he manufactures or sells, to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and to secure such profits as result from a reputation for superior skill, industry, or enterprise. A trade-mark which designates the true origin or ownership of the article manufactured or sold will be protected, but words which have no other relation to the origin or ownership than merely to indicate the name or quality will not be protected. Nor will words be protected which all persons may use with equal truth as to the nature of a fact which they are used to signify, because all alike have the right to employ them for the same purpose. And so, too, a name merely descriptive of an article of trade, its qualities, ingredients, or characteristics, cannot be employed as a trade-mark, and the exclusive use of it be entitled to legal protection. That one may use an arbitrary word, when not descriptive of the character or quality of the article to be sold, seems to be settled by the rulings of various courts. Noted instances of this are ' Pride ' as a trade-mark for cigars, ' Charter Oak ' for stoves, ' Lone Jack ' for tobacco. Is not the term ' Snowflake ' a mere descriptive term ? In its common and ordinary sense it is understood to be descriptive of whiteness, lightness, or purity, words which of necessity belong to the public and are common alike to all. When applied therefore to crackers and biscuits it affirms unquestionably that they are white, light, and pure. Whether used to describe the quality or style of this sort of merchandise or not, it does signify those facts which others by its use may express with equal truth, and therefore have an equal right to its use for that purpose.' Familiar examples of terms not capable of being made trade-marks are " pictorial," " night blooming," " colonial," " ferro-phosphorated," " nourishing," " 1/4 " (including tobacco of two different kinds), " porous," " rye and rock " (*Van Bell v. Prescott*, 82 N. Y. 630).

 MECHANICS AND TRADERS' INSURANCE COMPANY V. RICHARDSON.

(33 La. Ann. 1808.)

Partnership — note of firm made by one partner for his individual debt.

Where one sues a firm on a note executed to him in their name by one of the partners for his individual debt, he cannot recover against the firm or the other partners without affirmatively showing that partner's special authority or a ratification by the other partners. (*See note, p. 293*)

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ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

H. N. Ogden, for appellee.

John A. Campbell and Bayne & Renshaw, for appellant.

BERMÚDEZ, C. J. The defendants, a firm once composed of John P. Richardson and George W. Cary, are sought to be held liable as indorsers on two notes purporting to have been drawn, the one by W. A. & C. W. Cary and the other by J. J. Pierce, and which were duly protested, notice of same having been regularly given.

Richardson denied any liability, specially pleading that the indorsement was for no consideration inuring to the firm or to him, as plaintiffs knew or should have known; that said notes or indorsements were not made or used for said firm or within the course of its business and by any person authorized thereto; that the notes were received by plaintiffs in a private matter with George W. Cary, totally disconnected with the firm and respondents, as plaintiffs knew or should have known; that the firm was dissolved long prior to the institution of this suit. After trial the lower court gave judgment for one of the notes for \$1,219.08, and rejected plaintiff's demand for the other for \$1,733.39. From the judgment against him Richardson has appealed.

The evidence shows that the notes were indorsed by G. W. Cary, in the name of Richardson & Cary, and were subsequently indorsed by him in his individual name, and used for his individual purposes to plaintiff's knowledge, the consideration of the transaction being given to him in his individual capacity; that the notes never belonged to the firm, which had been dissolved prior to the delivery to the plaintiffs of the note of W. A. & G. W. Cary, the dissolution being known to the plaintiffs.

We think that under the circumstances of this case the indorsement of Richardson & Cary, being in the hand of G. W. Cary, and G. W. Cary subsequently indorsing the notes, to the knowledge of plaintiffs, in his individual name and using them for his individual purposes, to the knowledge of the plaintiffs, these were under the obligation of proving that the transaction had been authorized by John P. Richardson, or that the consideration had inured to him or to the firm in some manner which they have not done.

A mortgage of firm property by a partner, in his own name, conveys no title.

The act of each partner is considered the act of the whole partnership or of all the partners only so far as that act was within the scope of the business of the firm. 1 Pars. on Part. 1873, 184; 2 Miss. 163; 15 Ga. 197.

Judge STORY says: "Every contract in the name of the firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in favor of the firm." Story on Part., §128; see also, Chitty on Bills, 48.

The American adjudications decidedly assume, says Parsons, p. 121, that the third party taking this paper with the knowledge that it was given for the private or personal debt of one partner, knows enough to put him on his guard, and that he is now bound to inquire whether the firm authorized the use of their name, and can only hold them on the ground that they did so authorize it in fact, and this he must show as the foundation of his claim. In other words, the American courts hold the doctrine, that a third party taking from a partner the signature of his firm for his own debt cannot hold that firm without proof of authority, adoption or ratification by the firm. 1 Pars. on Part. 184; 6 B. Monr. 60; 4 Wend. 168; 30 La. Ann. 1291. *Multo fortiori* is such the case, where the paper is uttered after the dissolution of the firm, as is clearly proved as to one of the notes. 1 Dan. on Neg. Inst. 278; 3 Kent. Com. 63; Collyer on Part. 544, 127; 1 Stark. Ev. 275; 30 Vt. 225; 25 Ala. 475.

"The power of a partner is limited to the business of the firm. He who knows that the partner's act is not within the business, knows that it is not authorized, and if all he knows is, that the partner is acting for his own immediate, direct and several benefit, he has no right to presume that the firm are benefited and authorized it." 1 Pars. on Part. 228.

There are some acts in relation to negotiable paper which carry with them the presumption that the partner doing them was not authorized. One of these is the indorsing paper which does not belong to it. P. 235.

"If the firm resists payment, it will be sufficient to show that a copartner signed the firm name for a private debt due the plaintiff,

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and its defense is then complete, unless the plaintiff reply by showing the assent of the copartners." 1 Dan. on Neg. Inst. 276; 12 Pet. 299; Collyer on Part., §§ 490, 491; 28 La. Ann. 941; 10 L. 416; 5 id. 49.

Under the circumstances and the law, we cannot hold the defendant, John P. Richardson, liable.

It is therefore ordered, adjudged and decreed that the judgment of the lower court condemning defendant Richardson to pay \$1,-219.08 with interest and costs, be reversed, and that judgment be now rendered in favor of said defendant rejecting plaintiff's demand, and it is further ordered and decreed that said judgment exonerating said defendant from liability for the note of \$1,733.39 be affirmed, the plaintiff to pay costs in both courts.

Rehearing refused.

FENNER, J., did not sit, having been of counsel.

NOTE BY THE REPORTER. — A similar ruling was made in *Mutual National Bank v. Richardson*, 33 La. Ann. 1812. The court said: "If a creditor of one of the two partners choose to take from his debtor what he knows to be partnership securities, or partnership funds, without ascertaining whether the debtor has the authority of his partner as to the application of partnership funds, he does so at his own peril, and it is not enough that he has even a reasonable cause to believe in the existence of the authority." *Kendall v. Wood*, L. R. 6 Ex. 243; *Lereson v. Lane*, 13 C. B. (N. S.) 278; *Maulden v. Branch Bank*, 2 Ala. 502, 512, 513; 18 Wend. 466; 1 Ala. 565; 6 R. 120.

"In *ex parte Golding* (Collyer on Partnership, 283), Lord LYNDBURST said: 'No principle can be more clear than that, where a partner and a creditor enter into a contract on a separate account, the partner cannot pledge the partnership funds, or give the partnership acceptances in discharge of the contract, so as to bind the firm.' The judgment was put on the ground, that unless the other partner assented to the transaction he was not bound, and that it was the duty of the creditor to ascertain whether there was such assent or not.

"In *Dob v. Halsey*, 16 Johns. 34, the difference between English and American Jurisprudence was said to be merely on the question of *onus*, it being there on the partner sought to be held responsible, while it is here on the creditor seeking payment. It was there said that there exists no substantial difference between taking the note of a firm for a private debt of one of the partners, by a separate creditor of a partner pledging the security of the firm, and taking the property of the firm to pay his private debt. 'In both cases the act is equally injurious to the other parties. It is taking their common property to pay a private debt of one of the partners.' 7 Wend. 826; 6 Johns. 251

"In *Royce v. Batchelder*, 12 Pet. 221, the U. S. Supreme Court, Justice STORY being its organ, said: 'Whatever acts are done by any partner in regard to partnership property or contracts, beyond the scope of the partnership, must in general, to bind the partnership, be derived from some further authority, expressed or implied, conferred on such partner, beyond that resulting from his character as a partner. Such is the general principle, and in our judgment it is founded on good sense and reason. One man ought not to be permitted to dispose of the property, or bind the rights of another, unless the latter has authorized the act. In the case of a partner paying his own debt out of the partnership funds, it is manifest that it is a violation of his duty and of the right of his partners, unless they have assented to it. The act is an illegal conversion of funds.' 13 East, 175; 2 Stark 347.

"See also, 1 Dan. on Neg. Inst. 272, and cases cited; 10 La. 416; Chitty on Cont. (11th ed.) 254; Add. on Cont. 76; Collyer on Part. 283; Collyer on Cont. §§ 401, 478; Story on Part. §§ 128, 140; Pars. on Part. (2d. ed.) 221."

See *Cotshausen v. Judd*, 43 Wis. 213; s. c., 28 Am. Rep. 539; *Johnson v. Hershey*, 70 Mo. 74; s. c., 35 Am. Rep. 303; *Carrie v. Cameron*, 31 Mich. 373; s. c., 18 Am. Rep. 192.

HARTWELL V. ALABAMA GOLD LIFE INSURANCE COMPANY.

(33 La. Ann. 1853.)

Insurance—life—habits of sobriety.

An applicant for insurance on his own life answered in the application that his habits then were and always had been sober and temperate, and agreed that the policy should be held void if any untrue answer should have been made. *Held*, that this answer being in fact untrue, the policy was void, although the answer was made in good faith and with no intent to deceive.

ACTION on a life policy. The opinion states the case. The plaintiff had judgment below.

Bayne & Denegre, for appellee.

Thos. J. Semmes, for appellant.

LEVY, J. This appeal is taken from a judgment of the Fifth District Court for the parish of Orleans, based on the verdict of a jury for the sum of \$5,000, with legal interest thereon from February 5, 1877, being the amount of a policy of insurance on the life of Thomas C. Hartwell for said sum of \$5,000. The policy is dated on the 30th of March, 1874, in favor of his children, the plaintiffs in this action.

Hartwell, the insured, died on the 7th of November, 1877. Due proof of his death was made and submitted to the company and acknowledged, as to its receipt, on the 11th of December, 1877. Under the terms of the policy, if not forfeited and avoided for the causes therein set forth, it was payable within ninety days after proof of death of the insured.

On demand, within the delay fixed for payment of the amount of the policy, the defendant company refused to pay the same, alleging as reason for such refusal, that the policy had become void, and all the rights of the insured therein and thereunder forfeited by reason of misrepresentations and false statements made by the deceased in his application for insurance, which application and the statements made therein were the basis and consideration of the issuance of the policy, and that the deceased had warranted the truth of the statements and declarations therein contained, and their falsity operated the annulment of the contract, as also the forfeiture of all premiums

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paid by the insured. The misrepresentation and false statements relied upon by defendant are those made by the deceased in his application, touching the use by him of intoxicating liquors and his habits as to sobriety, anterior to and at the time of making the application, as well as to his subsequent habits of drink.

There is no dispute as to the law governing the case, and it presents a naked question of fact for our review and decision.

Question seven in the application is as follows : “ Are the habits of the party, at the present time and have they always been, sober and temperate ? ” To which the applicant responded “ Yes. ” In the application there is a further declaration by the applicant, to wit : “ If the party, proposed to be insured on this application for insurance, shall become so far intemperate in the use of opiates, or ardent spirits or intoxicating beverages as to seriously impair his health and shorten the term of his life, then all moneys which shall have been paid on account of such insurance shall be forfeited to the said compay, and the policy void. ” Question thirty-two, propounded this inquiry : “ Is the party aware that any untrue or fraudulent answers to the above questions or any suppression of the facts in regard to the party’s health will vitiate the policy and forfeit all payments made thereon ? ” to which we find the response “ Yes. ” The application also contains the following : “ This declaration and the above proposed shall be the basis of the contract between us and the said company. ”

Here then is a plain, clearly expressed contract, entered into with a full and explicit declaration of the intentions of the parties, a clear understanding of the basis of the contract, a distinct acknowledgment of the liabilities incurred on both sides, and an unmistakable announcement of the penalties attaching to the untruthfulness of the statements and declarations on which the contract is based.

For the present case and its decision we deem it necessary only to direct our inquiries to the question : Were the declarations of the insured, as contained in his application, true ?

Numerous witnesses have testified as to the habits of the deceased in the use of intoxicating liquors, prior to and at the time of his effecting the insurance upon his life and subsequent thereto. Habits of intemperance generally grow upon the victim gradually and to him insensibly, and he is aroused to an appreciation of his true condition, if at all, long after the habit has become fixed and has attracted, if not public attention at least that of those who are

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thrown into daily or constant social or business intercourse with him, and with self-sufficiency and egotistical faith in himself, he denies and resents as inapplicable to him, what is apparent to others. But this denial on his part or disbelief as to his condition, does not affect its real existence, and while from misconception of the truth growing out of a perverted or distorted view taken by himself, he may be acquitted of any dishonest attempt at deception or misrepresentation, his solemn declaration, although made without fraudulent or untruthful intent, which induces another to bind himself in a manner which he would not have done in the absence of such declaration, cannot be invoked to the detriment of that other who binds himself on the faith of its correctness.

We do not deem it necessary to enter into a detail of the testimony found in the record, which on the one hand goes to establish, if not the temperance and sobriety of the deceased, the absence of excessive indulgence in the use of ardent spirits or intoxicating liquors, and on the other hand the existence of such excessive use or indulgence. We have read all the evidence carefully, have considered the character and good reputation of all the witnesses, the relation which they bore to the deceased, their business and social intercourse with him, their means of knowledge and of observation, their general and special and intimate acquaintance, and we can arrive at no other conclusion as the result of a critical examination, in which we have sought to give its due weight to the testimony of all the witnesses, than that the representations made by the deceased, Thomas C. Hartwell, in his application for insurance and which formed the basis and a material consideration for the policy, in so far as they relate to his habits of sobriety and temperance prior to and at the time of the application, are not in accordance with his real condition, and not in themselves truthful in the sense in which the insurance company accepted and acted upon them.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the defendant rejecting the demands of plaintiffs at their cost in both courts.

Rehearing refused.

CASES
IN THE
SUPREME COURT
OF
MAINE.

SIMPSON V. GARLAND.

(72 Me. 40.)

Negotiable instrument — signing by agent.

A note, by which "the subscribers for Carmel Cheese Manufacturing Co. promise to pay," and signed by the directors of the company without official description, is the obligation of the company. (*See note, p. 299.*)

ACTION on a promissory note. The opinion shows the facts. The plaintiff had judgment below.

A. L. Simpson, for plaintiff.

W. H. McCrillis and *Chas. P. Stetson*, for defendants.

LIBBEY, J. The question involved in this case is, whether the note in suit is the note of the defendants or of the Carmel Cheese Manufacturing Company.

The common-law rule, as declared by the earlier decisions, upon this question, has been, to some extent, modified by our statute (R. S., ch. 73, § 15) and the more recent decisions of the courts. In *Nobleboro' v. Clark*, 68 Me. 87; s. c., 28 Am. Rep. 22, this court,

after an examination of decided cases and our statutory provisions, declared the rule as follows: "Applying the principles settled by the courts, and the provisions of our statutes to the question under consideration, we think the true rule in this State is, that where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent, that it should be his deed and not the deed of the agent or attorney, it must be regarded as the deed of the principal or constituent, though signed by the agent or attorney in his own name. In determining the meaning of the parties, recourse must be had to the whole instrument, the granting part, the covenants, the attestation clause, the sealing and acknowledgment, as well as the manner of signing. If signed by the agent in his own name, it must appear by the deed, that he did so for his principal. This may appear in the body of the deed, as well as immediately after the signature."

This rule applies with full force to simple contracts, as well as to deeds; and applying it to the note in suit, it remains to be determined whether it appears by the terms of the note, that it was the intention of the parties to bind the Carmel Cheese Manufacturing Company, and not the defendants. In determining this question, we must assume that the defendants were duly authorized to make the note for the company. They offered to prove it, and as the statute cited, makes the authority of the agent an essential element to be considered, we think the evidence offered to prove the authority was admissible. *Nobleboro' v. Clark*, 68 Me. 93; s. c., 28 Am. Rep. 22; *Draper v. Mass. Steam Heating Co.*, 5 Allen, 339.

The defendants sign their own names only; but in the body of the note they say, "We, the subscribers, for the Carmel Cheese Manufacturing Company, promise to pay." If the words "for the Carmel Cheese Manufacturing Company," had been omitted from the body of the note, and had been written against the defendant's signatures, the authorities are quite uniform that the note would be the note of the company, and not of the defendants. *Sturdivant v. Hull*, 59 Me. 172; s. c., 8 Am. Rep. 704; *Atkins v. Brown*, 59 Me. 90; *Sheridan v. Carpenter*, 61 id. 83; *Winship v. Smith*, id. 121; *Bellou v. Talbot*, 16 Mass. 461; *Tucker Man'fg Co. v. Fairbanks*, 98 id. 101; *Morrell v. Coddington*, 4 Allen, 403; *Draper v. Mass. Steam Heating Co.*, 5 id. 338.

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By the rule laid down in *Nobleboro' v. Clark, supra*, the words used in the body of the note, tending to show the meaning of the parties, should have the same force and effect as if following or written against the defendant's signatures. Their meaning is as significant in the one case as in the other. We are aware that the Massachusetts court in *Morrill v. Coddington, supra*, held differently, and in discussing the question of the effect of the language used in the body of the note, say: "Had these words immediately preceded or followed the names of the signers, with the 'by' or 'for,' it would have been the promise of the Baptist Church of Lee"; but it was held that they did not have the same effect in the body of the note. This case, in this respect, is neither in harmony with the later decisions in Massachusetts nor with our own. *Carpenter v. Farnsworth*, 106 Mass, 561; s. c., 8 Am. Rep. 360; *L. & G. Manufacturing Co. v. Russell*, 112 Mass. 387; *Chipman v. Foster*, 119 id. 189.

In the note the defendants say: "We * * for the Carmel Cheese Manufacturing Company, promise." "For his principal" are the words used in our statute above cited, in regard to the proper execution of a contract by an agent; and "for" when so used, means "in behalf of." *Ballou v. Talbot*, and *Tucker Man'g Co. v. Fairbanks, supra*. The language used discloses the name of the principal, and is equivalent to a declaration by the defendants, that they promise in behalf of their principal, and not for themselves; and we think both parties must have so understood it. Upon the evidence reported, the defendants are not personally liable.

Default off; action to stand for trial.

APPLETON, C. J., WALTON DANFORTH, VIRGIN and PETERS, JJ., concurred.

NOTE BY THE REPORTER.—Several analogous cases in this volume of Maine Reports may advantageously be grouped with this.

In *Purinton v. Ins. Co.*, 72 Me. 22, upon an agreement commencing, "This agreement made between Fletcher & Bonney of Boston, Superintendents of New England Agencies for the Security Life Insurance and Annuity Company of New York, of the first part, and Stephen O. Purinton, of the second part," and ending, "In witness whereof the said parties have set their hands and seals. John W. Fletcher, Supt. N. E. Agent (seal), Stephen O. Purinton (seal)," everything in the body of the instrument being appropriate to an agreement with the company, and inappropriate to an agreement with the agents of the company, held that an action may be maintained by Purinton against the company, if the agreement is authorized by the company, for a breach of the covenants of such agreement. Citing *Nobleboro' v. Clark, supra*, the court said: "It is our belief that the persons concerned in drafting the instrument before us intended that the defendants should be bound

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by it. We think that the instrument taken as a whole is appropriate for that purpose. The names of the principals are disclosed. The persons acting for them are denominated superintendents, implying an agency on their part. The business to be performed by the plaintiff is for the company and not for the agents of the company. The plaintiff is to receive his instructions from and make his reports to the company. His compensation comes from the company." "The plaintiff contends that the meaning is that Fletcher and Bonney 'for' the insurance company enter into the contract. The defendants render it as merely describing themselves as superintendents 'for' the New England agencies 'of' the insurance company. The words alone could be construed either way. But with the aid of the light that is shed upon this part of the contract from its other parts, we think it may well be supposed that both ideas are involved in the expression, and that Fletcher and Bonney meant to say that they were the agents of and were also contracting for the insurance company."

In *Castle v. Belfast Foundry Co.*, 72 Me. 167, it was held that a note signed "Belfast Foundry Company, N. W. Castle, President," binds the company. The court said: "It is urged that 'the notes declared upon do not on their face purport to be the promissory notes of the Belfast Foundry Company.' The notes in suit were payable 'at office of Belfast Foundry Company.' They were intended to bind some person or corporation. They were not intended to bind the president personally, for if they had been so intended he would not have signed the name of the corporation whose agent he was and which he had ample authority to bind. In *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338, the signature was as in the case at bar. Thus, 'Massachusetts Steam Heating Company., L. S. Fuller, Treasurer.' In his opinion, HOAR, J., says: "The name of the company is signed to the note. This signature could not be made by the corporation itself, and must have been written by some officer or agent. It was manifestly proper that some indication should be given by whom the signature was made, as evidence of its genuineness; and Fuller added his own, with the designation of his official character. And that the whole, taken together, shows it to be the signature of the Massachusetts Steam Heating Company, and not of Fuller.' The principle decided in this case is to be found in *Abbott v. Shawmut Ins. Co.*, 3 Allen, 215, and in *Atkins v. Brown*, 59 Me. 90. In the cases cited by the learned counsel for the defendant the signer appends to his signature a description of himself as agent, president, trustee or treasurer of some corporation, as in *Slawson v. Loring*, 5 Allen, 340, the next case to that of *Draper v. Mass. Steam Heating Co.*, before cited, as well as in the other cases relied upon."

In *Russell v. Folsom*, 72 Me. 486, it was held that an action may be maintained by the indorsee of a promissory note payable to the order of a corporation and indorsed thus: "Charles B. Folsom, Treas.," by one who held that office in the corporation and was authorized to perform the financial business thereof. The court said: "In *Farrar v. Gilman*, 19 Me. 441, the indorsement was by the cashier. In *Chase v. Hathorn*, 61 id. 505, by A. Hobart, treasurer of Newport Savings Bank; in *Dunn v. Weston*, 71 id. 275; s. c., 36 Am. Rep. 310, by the treasurer. In *Castle v. Belfast Foundry Co.*, 72 Me. 167, the signature was Wm. H. Castle, President. In *Nicholas v. Oliver*, 36 N. H. 219, the indorsement was by W. Earl, Sec'y, and held a good indorsement of a note payable to an insurance company. In *Folger v. Chase*, 18 Pick. 63, the note of a bank was indorsed P. H. Folger, Cashier, and it was held to pass the title to the note, WILDE, J., remarking that "the indorsement by the cashier in his official capacity sufficiently shows, that the indorsement was made in behalf of the bank, and if that is not sufficiently certain, the plaintiffs have the right now to affix the name of the corporation.' In *McIntyre v. Preston*, 5 Gil. 48, a note payable to a corporation was transferred by its authorized officer indorsing the same by his own name with his official designation and the indorsement was held to pass the title to the note." See *Hypes v. Griffin*, 89 Ill. 134; s. c., 31 Am. Rep. 71; *Hardy v. Pilcher*, 57 Miss. 18; s. c., 34 Am. Rep. 431; *School Town of Monticello v. Kendall*, 72 Ind. 91; s. c., 37 Am. Rep. 139; *Anderson v. Pearce*, 36 Ark. 293; s. c., 38 Am. Rep. 39; *Bryson v. Lucas*, 84 N. C. 680; s. c., 37 Am. Rep. 634; *Tilden v. Barnard*, 43 Mich. 76; s. c., 38 Am. Rep. 197.

In *Buffalo Cath. Inst. v. Wetner*, N. Y. Ct. App., Dec. 1881, the contract was made by an officer on behalf of a corporation, and commenced: "Articles of agreement between W. of the first part and F., president, of the second part," and was signed and sealed by

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the parties, F. adding to his signature the words, "Pres't of Buffalo Catholic Institute." The contract contained a provision that it was made on condition "that the Buffalo Catholic Institute will accept and approve of this purchase and its terms and agreement on or before November 1, next." *Held*, that the contract was between W. and F. and not between W. and the corporation.

In *Pack v. White*, 78 Ky. 243, a note running, "we, the directors of the Big Eagle and Harrison Turnpike Company, promise," etc., and signed by the defendants as individuals, was held the individual obligation of the signers. The court said: "There is nothing on the face of the paper showing that the money was to be applied to the benefit of the corporation or to discharge a debt due by it. The corporate name embodied in the note may imply that the corporation was interested in some manner in the consideration; but to make it liable on the obligation it must be averred and proven that it was executed and received as the obligation of the company, and by mutual mistake the parties failed to use language creating the liability. If these independent averments must be made in order to recover against the company, it necessarily follows that without such averments it must be regarded as a joint undertaking of the parties whose names appear as obligors. This is the proper test in determining the liability of parties upon the face of an instrument like this. If averments are necessary other than that the parties signed the note and undertook to pay and had failed to comply, in order to make the corporation liable, the paper must be regarded as the obligation of those signing it, and instead of raising the question of corporate liability by demurrer, it can only be made by a proper answer. Certain language contained in obligations has been held to be in explanation of the intention of the parties, and when appearing on the face of the paper that the writing had been given for the debt of the corporation, the presumption has been indulged in some cases that the parties signing were not individually liable.

"There is a material difference between this class of cases and the case being considered. In the case of *Trask v. Roberts*, 1 B. Monr., the note read as follows: 'For value received we, as trustees of the town of Harrodsburg, jointly and severally promise to pay,' etc. In that case the defense was made by answer, but the pleading made no other defense than could have been raised on a demurrer. There was no allegation of a mistake in the execution of the instrument or any statement of facts showing that its legal effect was different from that intended by both parties. In the case of *Yowell v. Dodd*, the note read: 'Twelve months after date the president and directors of the Hustonville and Bradfordsville Turnpike Company will pay,' etc. This court held that it was the note of the corporation, and made a distinction between that case and the case of *Whitney v. Sudduth*, 2 Metc., as in the last named case the promise was, 'we, or either of us, president and directors, promise to pay.' The effect of such language as was used in the last named case has always been adjudged to be an individual promise by the party signing, and not in his official capacity."

In *Faw v. Meals*, 55 Ga. 711, it was held that the following obligation created an individual liability on the part of the maker: "Received of Mrs. Julia B. Meals by the hands of Mrs. Mary W. Phillips, \$900, which said sum of money I obligate myself to use in running capital of the Marietta mill, and keep the same in money, stock, material and paper, not subject to the debts of the mill. I further obligate myself and promise to pay Mrs. Meals twelve and one-half per cent interest on the same, payable monthly. I further obligate myself and promise to pay Mrs. Meals as much as \$500 of the principal sum on or before May 1, next, if called upon, the remainder due and payable twelve months after date, at which said time and date I promise to pay Mrs. Meals or bearer whatever of said principal sum and interest which may be due and unpaid. (Signed) E. Faw,

"Agent of the Marietta Paper Mill Company."

In *Dayton v. Warne*, 43 N. J. 659, a bond was executed by A. B. C. and others "trustees of the Methodist Episcopal church, of Jacksonville, their successors and assigns," binding themselves, their heirs, executors and administrators, and signed by them individually. *Held*, a personal and not a corporate bond. The court said: "When a private agent does not attempt, in a sealed instrument, to bind his principal, and in terms imposes the obligation on himself, I regard the rule as entirely settled that he incurs by such act a personal liability. Chief Justice Gibson, in *Hopkins v. Mehauffey*, 11 S. & R. 126, says that such is the legal result, and such agent is liable on his express covenant, although he de-

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scribe himself as contracting for and on behalf of his principal. That this is the English rule appears to be evidenced by a uniform train of decisions beginning with *Combes*' case reported by Lord COKE, 9 Rep. 75, down to the recent case of *Furnivall v. Coombes*, 5 Man. & Gr. 736. This last case is strikingly indicative of the strength of the rule above asserted and is closely in point with respect to the language creating the personal obligation. The indenture in that case related to the doing of repairs on a parish church, and the defendants covenanted for themselves and for their successors, church wardens and overseers of the said parish, and their assigns.' After this covenant thus expressed, there was a proviso to the effect that nothing in this instrument should be construed as imposing any personal covenant or obligation upon the persons executing; but the court held that as a personal obligation was clearly created in the obligatory part of the bond, the proviso was void on the ground of repugnancy, and held the defendants individually liable. The great bulk of the decisions in this country rests on this same ground. Many of them will be found collected in 1 Am. L. C. 608, in note to the case of *Elwell v. Shaw*, Thomp. Liability of Officers and Agents, 100; see also, *Sheldon v. Dunlap*, 1 Harr. 245; *Den v. Hay*, 1 Zab. 174; *Brown v. Combs*, 5 Dutch. 38."

In *Hitchcock v. Buchanan*, United States Supreme Court, April 10, 1882, the action was on the following bill of exchange:

" OFFICE OF BELLEVILLE NAIL MILL Co.,
BELLEVILLE, ILL Dec. 15, 1875. }

" \$5,477.12.

" Four months after date, pay to the order of John Stevens, jr., cashier, \$5,477.12, value received, and charge same to account of Belleville Nail Mill Co.

" WM. C. BUCHANAN, *President*,

" JAMES C. WAUGH, *Secretary*.

" To J. H. Pieper, Treasurer, Belleville, Ill.

The court, GRAY, J., said: "The bill of exchange declared on is manifestly the draft of the Belleville Nail Mill Company, and not of the individuals by whose hands it is subscribed. It purports to be made at the office of the company, and directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary. An instrument bearing on its face all these signs of being the contract of the principal cannot be held to bind the agents personally. *Sayre v. Nichols*, 7 Cal. 535; *Carpenter v. Farnsworth*, 108 Mass. 561; s. c., 8 Am. Rep. 360, and cases there cited."

In *Scanlon v. Keith*, 102 Ill. 634, the note was in ordinary form, "we promise to pay," etc., but was signed, "Samuel L. Keith, President, Chicago Ready Roofing Co.," and at the left side was signed, "W. H. Kretzinger, Secretary," with the seal of the Chicago Ready Roofing Company, attached. Held, that evidence was admissible to show the incorporation, etc. The court said:

"Whatever may be the decisions elsewhere on analogous questions, the authorities in this State are full to the point a party will not be permitted to show by oral testimony, that his written agreement, understandingly entered into, was not in fact to be binding on him. Accordingly it was held in *Hypes v. Griffin*, 89 Ill. 134; s. c., 31 Am. Rep. 71, mainly on the authority of *Powers v. Briggs*, 79 Ill. 493, that where trustees of a church corporation made a note in their individual names, although they described themselves as trustees of the church, parol evidence was inadmissible to show it was the intention of the parties it was to be the note of the church corporation and not the note of the trustees executing it. The principle running through that and other cases in this court is, that such instruments will be construed as the parties made them, without the aid of extrinsic evidence. That rule of interpretation would seem to be as well settled in this State as any rule can be. But there is another principle declared in *Hypes v. Griffin*, that has more immediate application to the case in hand. It is that where a party signs his name as cashier or agent for a banking, railroad or other corporation in drawing drafts and bills or in accepting drafts or other evidences of indebtedness in its ordinary business, if it appears, or is made to appear, it is the obligation of the corporation, and the cashier or agent or other officer had authority to bind the corporation, he is not personally liable, and the facts may be shown by extrinsic evidence. Most generally there is that on the face of the instrument itself, and especially where the execution is witnessed by the seal of the corpora-

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tion attached thereto, that indicates unmistakably it is the obligation of the corporation. It is seldom any one takes such paper under the belief it is the obligation of the officers executing it on behalf of the corporation. But parol testimony is admissible to establish the facts, collateral though they may sometimes be, that will make it appear past all doubt whose obligation it is. In this case it was quite proper defendant should prove the "Chicago Ready Roofing Company" was a corporation existing under the laws of this State, and the character of the business transacted by it."

"This case is certainly a much stronger one for holding the note in suit to be the obligation of the corporation than the case of *New Market Savings Bank v. Gilet*, 100 Ill. 254. In that case the parties making the note used the words 'we' in the body of it, as was done in the note in this case but because it was followed immediately by the name of the corporation of which they were trustees, it was held the word 'we' had reference to the corporation and not to the trustees in their individual capacity. Opposite their signatures was placed the name of the corporation. The conclusion was, it appeared on the face of the note itself it was the obligation of the corporation. More cogent reasons lead to the same conclusion the note in suit was executed officially and not individually, and the signatures with the official seal affixed were placed there as corporate acts, in order to the execution of the note as the obligation of the corporation."

See *New Market Savings Bank v. Gilet*, ante, 32.

 LOW V. TIBBETTS.

(72 Me. 92.)

Boundary—side of road.

A grant of land beginning and ending "at the side" of a road extends to the center, in the absence of words showing a contrary intention. (See note, p. 305.)

THE opinion states the point. The defendant had judgment below.

Asa Low, for plaintiff.

R. P. Tapley, for defendant.

BARROWS, J. The question is, whether the fee in the locus (which is a strip about twelve rods in length, by forty-four feet in width, being a section of a duly located street in the village of Spring Vale, running along the bank of Mousam river, cutting a lot formerly owned by the plaintiff very unequally, and leaving the largest part of it on the side farthest from the river, and a little irregularly shaped land between street and river) is in the plaintiff, or in the defendant.

After the street was built, plaintiff conveyed his lot to defendant,

describing first the more important part, as “situate in the village of Spring Vale * * * beginning on the north-easterly side of the new road leading from the Province Mills Bridge to the cotton mill, and at the southerly corner of the lot as now fenced belonging to school district number one, * * * and running (course given) by said road * * * to a stake,” and thence around the rear of the lot, “to the place begun at; also the land now owned by said Low between said road and Mousam river.”

The well-settled doctrine in this State is, that a grant of land bounded on a highway carries the fee in the highway to the center of it, if the grantor owns to the center, unless the terms of the conveyance clearly and distinctly exclude it, so as to control the ordinary presumption. *Oxton v. Groves*, 68 Me. 372; s. c., 28 Am. Rep. 75. Here the principal piece is bounded by the road as a monument or abuttal. So is the land lying opposite “between the road and the river.”

Is there enough in the language used, to exclude the street from the conveyance? The mere mention in the description of a fixed point on the side of the road as the place of beginning or end of one or more of the lot lines does not seem to be of itself sufficient. *Cottle v. Young*, 59 Me. 105, 109; *Johnson v. Anderson*, 18 id. 76; nor will similar language, with reference to monuments standing on or near the bank of a stream, in lines beginning or ending at such stream, prevent the grantee from holding *ad medium filum aquæ*. *Pike v. Monroe*, 36 Me. 309; *Robinson v. White*, 42 id. 210, 218; *Cold Spring Iron Works v. Tolland*, 9 Cush. 495, 496. The case of *Sibley v. Holden*, 10 Pick. 249 (20 Am. Dec. 521), cited by plaintiff, was commented on by this court, in *Bucknam v. Bucknam*, 12 Me. 465, and that of *Tyler v. Hammond*, 11 Pick. 193, in *Johnson v. Anderson*, 18 Me. 78; and the apparent force of these decisions is somewhat restricted and explained by the learned court which pronounced them in *Neuhall v. Ireson*, 8 Cush. 598, and *Phillips v. Bowers*, 7 Gray, 24; although it is apparent from the last case and from *Smith v. Slocomb*, 9 Gray, 36, that the Massachusetts court lays less stress upon the ordinary presumption, and requires less distinctness in the terms of the deed to obviate it, than we have done in the cases above cited from the 18th, 59th and 68th of our own reports. See also, Perkins' note to *Sibley v. Holden*, in the second edition of Pickering's Reports, vol. 10, p. 251.

Had the plaintiff run his first line “by the north-easterly side

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line of said road," instead of "by said road," and conveyed the land "lying between the south-westerly side line of said road and Mousam river," instead of that "lying between said road and Mousam river," a different question would have been presented.

In the absence of the very few words which were necessary to make plain an intention on the part of the plaintiff to reserve the fee in the land covered by the street to himself, we think the ordinary presumption and construction must prevail.

Nonsuit confirmed.

APPLETON, C. J., WALTON, VIRGIN, LIBBEY and SYMONDS, JJ., concurred.

NOTE BY THE REPORTER.—A contrary conclusion was reached in *Kings County Fire Ins. Co. v. Stevens*, New York Court of Appeals, Jan. 1882. A deed of land contained this description: "Beginning at a point on the southerly side of the Wallabout Bridge road and adjoining the land now or lately belonging to John Skillman," and after running certain courses, the line ran along the land of Jacobus Lott, "north forty-eight degrees and nine minutes west 594 feet to the Wallabout Bridge road," and thence along said road 1,225 feet to the place of beginning. Held, that the road-bed was excluded by the terms of the description, within the cases. *Jackson v. Hathaway*, 15 Johns. 447 (8 Am. Dec. 268); *English v. Brennan*, 60 N. Y. 609; *White's Bank of Buffalo v. Nichols*, 64 id. 65. The court said in substance: The case of *Sibley v. Holden*, 10 Pick. 249 (20 Am. Dec. 521); *Smith v. Slocumb*, 9 Gray, 36, and *Cottle v. Young*, 59 Me. 105, confirm this conclusion. The words "to" and "along" the road, in the description in question if not controlled by the starting point, would by well-settled construction carry the boundary line to the center, but it is to be observed that these words are not inconsistent with confining the boundary with the side of the road. It was held in *Duntram v. Williams*, 37 N. Y. 251, that a deed bounded on a highway is satisfied by title extending to the side of the road, when the title to the road bed was not in the grantor but in third persons, and according to the principle of that case the absence of such title where the description runs to and along a highway, would not constitute a breach of the covenant of seizin. It is generally if not uniformly conceded that a grantor of land abutting on a highway may reserve the highway from his grant. But the presumption in every case is that the grantor did not intend to retain the fee of the soil, and such reservation will not be adjudged, except when it clearly appears from the language of the conveyance that such reservation was intended. See also, *Child v. Starr*, 4 Hill, 369; *Halsey v. McCormick*, 18 N. Y. 296; *Seneca Nation v. Knight*, 23 id. 498.

A similar decision was reached by the New York Supreme Court, in *Lee v. Lee*, 37 Hun, 1. The description was by metes and bounds as follows: "Beginning on the east side of the Bloomingdale road, at the south-westerly corner of lot No. 2, sold to Caleb B. Bowering, and running thence along the southern boundary of the same, south, thence to the north-east corner of lot No. 4, * * * thence along the same north to the Bloomingdale road aforesaid, thence along the said road five chains to the place of beginning, containing four acres, be the same more or less." The court gave the following review of authorities:

"It is a well-settled rule that where land is described as beginning 'at a road,' or 'on a road,' or as 'bounded by a road,' or in other similar form of expression without qualifying words, the boundary or point of beginning is the center of the road, and not the side thereof; and so, where land is conveyed and described by a lot number as indicated on a map, and the land fronts on a road or highway, the boundary will be the center and not the side of the road. The first point of inquiry in such construction is usually to ascertain the place of beginning as the same is designated in the deed, and if the place of beginning, where ascertained, is a monument or in the nature of a monument, that is a controlling

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circumstance to determine the true location. In *White's Bank v. Nichols*, 64 N. Y. 65, the rule is thus laid down: 'Although the highway is in one sense a monument, it is regarded as a line, and the center of the highway in such case is regarded as the true boundary indicated, as is the case when a tree, stone, or other similar object is designated as a monument; the center, in the absence of any other indication, is regarded as giving the true boundary or limit of the grant. * * * But when the words clearly indicate an intention to exclude from the operation of the grant the soil of the highway, it is equally well settled that it does not pass, and the grantor retains the title, subject only to any easement which may exist in the public or in the grantee of the adjacent lands.' In that case the grant described the premises as commencing at the intersection of the exterior of two streets; and the court held that the point thus established was as controlling as any monument would have been, and must control the other parts of the description; and that all the lines of the granted premises must conform to the starting point thus designated, and that although but for that designation of the starting point of the survey, the lines along the two streets would have been carried to the center of those streets respectively, yet they were necessarily confined to the exterior lines of the streets, so as to connect at the starting point. And *English v. Brennan*, 60 N. Y. 609, is also cited as having decided that precise point.

"In the description of the deed now under consideration the point of beginning is given as '*the east side of Bloomingdale road.*' The effect is to make the east side of that road a fixed monument to mark the starting point of survey, and it is impossible without doing violence to the language used to transfer that monument to the center of the Bloomingdale road.

"In *English v. Brennan*, above referred to, the description in the defendant's deed began as follows: 'Beginning at the south-westerly corner of Flushing and Clermont avenues, running thence westerly along Flushing avenue twenty-five feet; thence southerly, at right angles to Flushing avenue, seventy-nine feet nine inches to a point distant forty feet seven inches and a half westerly from the westerly side of Clermont avenue.' It was held that by this description the grantor excluded the street from the conveyance; and this decision must have gone upon the ground that *the westerly side of Clermont avenue*, as mentioned in the description, was a fixed monument which controlled the other language of the description.

"In *Jackson v. Hathaway*, 15 Johns, 447, the boundary began at a stake by the side of the road and ran thence by specified courses and distances which gave the quantity called for, and it was held that the language rebutted the presumption that the fee of the land in the road was intended to be conveyed.

"In *Sherman v. McKeon*, 38 N. Y. 236, MILLER, J., in delivering the opinion of the court, says, at page 272: 'It is also equally clear that the deed to Robertson did not include the lot in question as the description bounds the premises by the '*late line of Grove street*,' evidently meaning the old line as it existed before the new one was established by the proceedings had by the corporation, which at that time had been quite recently confirmed. * * * It is said that the expression employed will be presumed to refer to the late center line in connection with the words after the description '*along and on Grove street.*' I think that it will not bear this interpretation. The description evidently makes a distinction between the old line and the new one; and in stating a line for a boundary it cannot well be said that the statement of itself makes the center the line.'

"In *Babcock v. Utter*, 1 Abb. Ct. App. 27, the description reads as follows: 'Beginning at a stake and stones on the west bank of the Unadilla river,' and thence it ran around the plat until another line came by the description to the river,' 'and thence down the west bank of the Unadilla river as it winds and turns, to the place of beginning.' The court say: 'The words '*to the Unadilla river*,' according to the usual interpretation of such an expression in conveyances would carry the line to the center of the river, as the general rule is that where a line touches the river it goes to the center. * * * The starting point is unequivocally from '*the bank*,' and not from the center of the river; and if the last line in the description is confined to the center of the river, it cannot run '*to the place of beginning*' as the description requires; and if it starts from the center of the river and runs '*to the place of beginning*' it would neither follow the center of the river nor the '*west bank as it winds and turns*,' according to the description in the deed.' And it was

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held that the description conveyed the farm to the west bank of the river only, leaving the title to the river and the land covered by it in the grantors.

"In *Smith v. Stocomb*, 9 Gray, 36-38, it was held that the conclusion is inevitable that the road is excluded when the boundary starts at the side of the road and comes back to the road, and thence on the line of the road to the place of beginning.

"In *Sibley v. Holden*, 10 Pick. 249, the court say. 'From this description we are all of the opinion that the line must begin on the side of the road, and at that point exclude the road; then the question is whether, when the description returns to the road again, it shall be taken to mean the side or the center of the road. If construed to be the center, then the remaining line would neither be by the side of the road nor the center, but by a diagonal line from a point in the center to a point in the side. This would not only be obscure and inconsistent with any supposed intent of the parties, but repugnant to the last clause in the description, which is 'by said road to the place of beginning.'

"A contrary rule was held by OAKLEY, J., in *Herring v. Fisher*, 1 Sandf. 344, but the question was not involved in that case, for the words of description were 'beginning at the road.' The learned judge thought those words were equivalent to 'beginning at the side of the road;' and upon that assumption he argued that the words 'running along the road' in the return lines were controlling, and must be held to carry the line along the center of the road."

See *Kneeland v. Van Valkenburgh*, 46 Wis. 434; a. c., 83 Am. Rep. 719.

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(73 Me. 115.)

Marriage — divorced woman's action against former husband.

A divorced woman can recover for services rendered by her to her former husband before the marriage.

ASSUMPSIT. The opinion states the point. The plaintiff had judgment below.

Pillsbury & Potter, for plaintiff.

S. and L. Titcomb, for defendant.

WALTON, J. The question is whether a woman who is divorced can maintain an action against her former husband for personal services performed for him before their marriage. We think she can. "A woman, having property, is not deprived of any part of it by her marriage." Such is the statute law of this State. R. S., ch. 61, § 2. The word "property" includes choses in action as well as choses in possession. It includes money due as well as money possessed. It includes money due for personal services as well as money due for any thing else. In its broadest sense it includes

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every thing which goes to make up one's wealth or estate. We cannot doubt that this is the sense in which it is used in this statute. It follows therefore that a woman, by her marriage, can no more be deprived of money due to her than she can of money actually possessed by her, of money due from the man she marries no more than of money due from any one else. It may be that while the marriage relation subsists no action of any kind can be maintained by her against her husband. But when this relation ceases, this impediment is removed, and no reason is perceived why she can not then sue him as well as any one else. We think she can. *Webster v. Webster*, 58 Me. 139; s. c., 4 Am. Rep. 253; *Blake v. Blake*, 64 Me. 177.

Exceptions overruled. Judgment on the verdict.

APPLETON, C. J., BARROWS, DANFORTH, PETERS and SYMONDS, JJ., concurred.

ROBINSON v. RING.

(72 Me. 140.)

Gift — savings bank deposit.

A. deposited money in a savings bank in the name of B. without any declaration of trust contemporaneously or subsequently, and not in view of death, and retained the deposit book until his death. *Held*, not a gift or trust. (See note, p. 310.)

A PPEAL from Probate decree. The opinion states the facts.

D. W. Robinson, petitioner in person.

J. W. Spaulding and *T. J. Buker*, for respondent.

APPLETON, C. J. This is an appeal from a decree of the judge of Probate ordering that the defendant account for and distribute among the heirs of Francis B. Ring the sum of thirteen hundred dollars, belonging to that estate but not included in the inventory of the same.

Notwithstanding there has been a settlement of the final account of an administrator, still upon ascertaining that there are out-

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standing debts due the estate and collectible, the Probate Court may open the administration and order further proceedings. "Even after final accounting and distributing, an executor still continues to be a trustee." *Paff v. Kinney*, 1 Bradf. 1.

The question presented is whether there are such debts due the estate, which have not been accounted for and which may be collected.

It seems that Francis B. Ring, having deposited in the Richmond savings bank the sum of \$2,000, the bank refused to receive a further deposit in his name; that he then made a deposit of three hundred dollars in the name of his brother, Stillman H. Ring; that he continued depositing in his name until the sum amounted to thirteen hundred dollars; that during all this time he retained the deposit book in his possession; and that at the time of his death it was found among his papers. There is no evidence of any delivery of the same to the brother. At one time when Stillman H. Ring and his brother were looking over the papers of the deceased, he had his book in his hands and asked his brother if he should keep it, to which the reply was, "No, not now, I will keep it."

No trust was declared when the deposits were made and there is no satisfactory evidence of any subsequent declaration of trust. Stillman H. Ring nowhere testifies that the deceased ever gave the deposit book to him.

This is manifestly not a gift *causa mortis*, for there is no evidence of any act or declaration under the pressure of immediate or impending death or of any delivery. *Grymes v. Hone*, 49 N. Y. 17; s. c., 10 Am. Rep. 313; *Case v. Dennison*, 9 R. I. 88; s. c., 11 Am. Rep. 222.

To constitute a valid gift *inter vivos* the giver must part with all present and future dominion over the property given. He cannot give it and at the same time retain the ownership of it. There must be a delivery to the donee. *Carleton v. Lovejoy*, 54 Me. 446. Here was no delivery as such. There is no act shown to have been done to pass the title. *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228. In *Hill v. Stevenson*, 63 Me. 367; s. c., 18 Am. Rep. 231, a delivery of a savings bank book, with intent to give the donee the deposits represented thereby, was held a good delivery to constitute a complete gift of such deposits, but here there is the absence of proof of any delivery or intent to give. There must be an intention to give, and this must be carried into effect by an actual delivery. *Taylor v. Fire Department of New York*, 1 Edw. Ch. 294.

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In all the cases cited there was a delivery or a declaration that the deposits were in trust as in *Minor v. Rogers*, 40 Conn. 513; s. c. 16 Am. Rep. 69, when shortly after the time of making the deposits the depositor stated that the deposits were for the boy in whose name they were made by her, as trustee, and the court found it was a complete gift at the time of the deposit. In *Kerrigan v. Rautigan*, 43 Conn. 17, the deposit was made by the depositor as guardian for the niece, in whose name the deposit was made and at the same time the declaration was made that it was for her. In *Davis v. Ney*, 125 Mass. 590; s. c., 28 Am. Rep. 272, there was a delivery and assignment which the court held a valid gift. In *Blasdell v. Locke*, 52 N. H. 238, the deposit when made was intended as a gift and subsequently the donee was informed of such intention, and the court enforced the trust upon which the deposit was made. In *Tillinghast v. Wheaton*, 8 R. I. 536; s. c., 5 Am. Rep. 621, the gift was one *in extremis*, and was accompanied with a delivery of the savings bank pass book.

Without going more fully into an examination of the authorities, the evidence fails to satisfy us that there was any intention to give, any delivery to, or any trust created in favor of Stillman H. Ring.

Decree affirmed.

WALTON, BARROWS, DANFORTH, PETERS and SYMONDS, JJ., concurred.

NOTE BY THE REPORTER. — In *Northrop v. Hale*, 72 Me. 275, R. deposited a sum of money in a savings bank in the name of her nephew, N. with a memorandum that the deposit could be paid to R. She retained the deposit book in her possession and drew out the dividends and part of the principal during her life-time. At her death the deposit book was passed to the administrator. Held, in a suit in equity by N. against the administrator of R. for the amount of the deposit at R.'s death, that evidence *abundant* as to the intention of R. in making the deposit is admissible to vary the effect of the entries in the deposit book. The court said: "Money is often deposited in savings banks in such a form, or under such circumstances as to give rise to litigation to determine who is the owner of it. The following are samples of this class of cases: *Blasdel v. Locke*, 52 N. H. 238, where the donor deposited money in a savings bank in the name of her niece, keeping the bank book herself. *Howard v. Windham Bank*, 40 Vt. 597, where A. deposited money belonging to himself to the credit of B. keeping the deposit book himself. *Gardner v. Merritt*, 32 Md. 78; s. c., 8 Am. Rep. 115, where a deposit was made by a grandmother in the name of five minor grandchildren, but subject to her order or the order of her daughter. *Minor v. Rogers*, 40 Conn. 513; s. c. 16 Am. Rep. 69, where the deposit was made in this form: 'Mary Daniels, trustee of William A. Minor.' *Ray v. Simmons*, 11 R. I. 206; s. c., 23 Am. Rep. 447, where the deposit was in this form: 'Dr. Fall River Savings Bank, in account with Levi Bosworth, trustee for Marianna Ray, Cr.' *Hill v. Stevenson*, 63 Me. 364; s. c., 18 Am. Rep. 231, where the deposit was made in the name of the donor and the bank book was delivered to the husband of one of the intended donees. *Gerrish v. New Bedford Institution for Savings*, 128 Mass. 159; s. c., 35 Am. Rep. 365, where a father made three deposits as trustee, one in trust for his only son and the others in trust for two grandchildren,

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taking separate deposit books and keeping them in his own possession. In all of these cases the gifts were sustained, but to enable the court to do so, resort was had to extraneous evidence, to ascertain the intent of the donors. And in the case last cited, the competency of such evidence was one of the questions submitted to the court, and the court held it was admissible. * * * The case now before us is one of the same class. We think the evidence is admissible. Such evidence was admitted in all the cases cited, and we have been referred to no case in which such evidence was rejected. In the case last cited (128 Mass. 159), it was one of the points expressly decided." See *Young v. Young*, 80 N. Y. 422; s. c., 36 Am. Rep. 684; *Pierce v. Boston Five Cent Savings Bank*, 129 Mass. 425; s. c., 37 Am. Rep. 371; *Conser v. Snowden*, post.

In *Wilcox v. Muttonson*, 53 Wis. 23, it was held, that to transfer title to personalty by gift, possession of the property must pass from the donor, during his life, to the donee. So where several hours before the death of W. he stated to the nurse in attendance upon him that his pocket-book was "under the bed, just under his shoulders," and requested her to "take it and give it (with its contents) to his wife when she came," but nothing was done toward complying with the request until some hours after W.'s death, when his body was moved and the nurse took the pocket-book from the place described and handed it to another person, to be given to the widow of the deceased if she should come, otherwise to be sent to her. Held, that the possession did not pass from W. during his life.

In *Meriwether v. Morrison*, 78 Ky. 572, M. a few months before his death indorsed upon each of two notes held by him, "I transfer the within note as a gift to Miss Agnes Morrison," and handed the notes to his nephew, directing him to put them away and give them to the assignee after his death. M. informed Miss Morrison that he had given her the notes. Held, sufficient to authorize a finding of a gift. Citing *Ray v. Simmons*, 11 R. I. 206; s. c., 23 Am. Rep. 447; *Ellis v. Secor*, 81 Mich. 485; s. c., 18 Am. Rep. 178; *Hill v. Stevenson*, 63 Me. 364; s. c., 18 Am. Rep. 231; *Minor v. Rogers*, 40 Conn. 512; s. c., 16 Am. Rep. 69; *Camp's Appeal*, 36 Conn. 88; s. c., 4 Am. Rep. 39; *Gardner v. Merritt*, 32 Md. 78; s. c., 3 Am. Rep. 115; *Southerland v. Southerland's Admr.*, 5 Bush, 591.

STUART V. WALKER.

(72 Me. 146.)

Will — devise — life-estate or fee

A testator bequeathed and devised property to his wife, "with the right to use, sell, or otherwise dispose of the same, and the income and increase thereof, according to her own will and pleasure, during her life-time. And so much of said estate, with the increase, income and proceeds thereof, as might remain unexpended and undisposed of by her at her decease," he gave to others. Held, that the wife took only a life-estate. (See note, p. 318.)

BILL for construction of a will. The opinion states the case.

Wilson & Woodward, for plaintiffs.

Chas. P. Stetson and E. Walker, for defendants.

PETERS, J. A testator makes the following devise: "I give, devise, and bequeath unto my wife, Mary Berry, all the rest and residue of my estate, real and personal, of what kind soever and wherever situate, with the right to use, occupy, lease, exchange, sell or otherwise dispose of the same, and the increase and income thereof, according to her own will and pleasure during her life-time. Meaning and intending hereby that the said Mary Berry during her life-time shall have the absolute right, power and authority to use and dispose of, by sale or otherwise, all said devised estate, real and personal, for her own support, and for any and all other purposes to which she may choose to appropriate it.

"And so much of said estate so devised to my said wife, together with the increase, income and proceeds thereof, as may remain unexpended and undisposed of by her at her decease, I give, devise, and bequeath unto the said Frances L. Sargent, her heirs and assigns forever, if she shall then be living; and if not living, then to such children or child of said Frances as may be living at that time."

Did Mary Berry take a fee simply, or only a life-estate, in the property devised?

The defendants contend that where a life-estate is devised, whether impliedly or expressly given, with an unqualified power of disposal annexed, a gift or limitation over is of no effect. That is true where the life-estate is created by implication, but not true where it is expressly created in direct and positive terms.

A life-estate by implication usually arises where a donor devises property generally, without any specification of the quantity of interest, and adds some power of disposition of the property, and provides a remainder. For instance: A. gives an estate to B., with a power of disposal annexed, and a gift over to C. Here is an association of purposes and intentions, divisible into three parts. What does A. mean by all of them combined? What is implied by them?

A. first gives the estate to B. in general terms. Stopping there, by our Revised Statutes, he gives an estate of inheritance. But an estate in fee first described may be cut down to a lesser estate by subsequent provisions.

A power of disposal is annexed by A. to his bequest to B. The effect of this depends upon whether it is a qualified or an unqualified power. If it is an absolute and unqualified power, it really neither takes from, nor adds to the amount of the estate previously given, though there be a gift over. It would be merely equivalent to add-

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ing words of inheritance, making the gift to B. and his heirs and assigns. But those words were implied before. The law presumes in such case that a testator superadds the unlimited power of disposal to make his intention as emphatic and unequivocal as possible. The gift over in such case is regarded as repugnant to and controlled by prior provisions. There is nothing to go over. A man cannot give the same thing twice. Having giving it once, it is not his to give again. Such a devise comes within the principle of the class of cases where a testator gives an estate of inheritance, and then undertakes to provide that the devisee shall not alien his property; or that it shall not be taken for his debts; or that he shall dispose of it in some particular way indicated; provisions which are powerless to control the prior gift.

But where the power of disposal is not an absolute power, but a qualified one, conditioned upon some certain event or purpose, and there is a remainder or devise over, then the words last used do restrict and limit the words first used, and have the force and efficacy to reduce what was apparently an estate in fee to an estate for life only. Thus: A. gives an estate to B., with the right to dispose of as much of it in his life-time as he may need for his support, and if any thing remains unexpended at B.'s death, the balance to go to C. Here they may be something to go over. B. is to dispose of the estate only for certain specified purposes. He can defeat the remainder only by an execution of the power. The clear implication of such a bequest, taking all its parts together, is that B. is to possess a life-estate. Here a life-estate is implied, and is not expressly created.

But A. makes this devise: "I give to B. my estate to have and hold during his life-time and no longer, with the right to dispose of all the same during his life-time, if he pleases to do so, and any unexpended balance I give to C." Here a life-estate is expressly created, instead of arising by implication. Here an absolute and unqualified power of disposal annexed does not enlarge the estate to a fee. Where an estate is expressed it need not be implied. An absolute control does not amount in such case to an absolute ownership. There is no conflict between the three parts of such a devise. Each clause in the combination may be literally executed. They are in no wise inconsistent with each other.

An examination of the cases invoked to the aid of the defendants shows that all or nearly all of them pertain to life-estates by impli-

cation, and are mostly instances where the purpose was, not to extend a life-estate, but to reduce what was apparently an estate in fee. In some of the cases cited may be found general expressions appropriate enough in the connection where used, which would be misleading when applied to devises such as the one now presented.

The English cases cited fail to sustain the defendants' view. As favorable a case as any upon their briefs, is *Parnell v. Parnell*, L. R., 9 Ch. Div. 96. There the words of the testator were : " I give and devise to my wife my real and personal property for her sole use and benefit. It is my wish that whatever property my wife might possess at her death be equally divided among my children." The question was whether the property was affected by a trust for the benefit of the children, which would debar the widow, then living, from disposing of it. The court replied that there was no definite gift over and no trust. It will be noticed that the gift was absolute, and not in any express words limited to an estate for life. *Breton v. Mockett*, id. 95, is also much relied upon by the defendants. In that case it was declared that a gift for life, to the wife of the giver, of farming stock and materials, she not to be liable for diminution or depreciation, gave an absolute property in those articles which *ipso usu consumuntur*. The question was whether the widow was entitled to the proceeds on a sale of the articles. But that case is an exception to the general rule. " There is an exception to the rule in the case of the bequest for life of specific things, such as corn, hay, and fruits, of which the use consists in the consumption. Such a gift is in most cases, of necessity, a gift of the absolute property," 1 Jarman on Wills, 5th ed. (Bigelow) p. *879, and cases in note. In *Merrill v. Emery*, 10 Pick. 512, it is said, " that where the use of things is given, which are necessarily consumed by the use, the gift is absolute, and the limitation over is void." It is plain enough that the principle of those cases does not apply to the case at bar.

Nor do our own cases support the position advocated by the defendants. In no case in this State has it been directly or indirectly held, that where there is a devise for life in express terms, a power of disposal annexed can enlarge it to a fee. In most instances, the question involved has been whether the gift to the primary legatee was absolute or qualified, in view of the ambiguous or contradictory expressions used ; the decisions being based upon the supposed intention of the testator as collected from the whole will.

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The only point necessarily decided in *Ramsdell v. Ramsdell*, 21 Me. 288, was, that the title to property passed to a purchaser, where the donee had sold the property under a power of disposal and converted the proceeds of the same to his own use. The opinion generalizes considerably upon the doctrine of the books upon this subject-matter, and some of its general statements would be more appropriate to the facts of that case than to this. Still the case demonstrates that the learned jurist, who pronounced the judgment in that case, had in view an estate for life, created by implication, and not one expressly created. The distinction set up here was clearly acknowledged there. The household goods were in that case decided to be the property of Sarah Crumpton only to the extent of a life-estate therein, because expressly so declared in the will; and a different rule was applied to the other property devised, for the reason that the donee's interest in such other property was not limited to a life-estate by any express words in the will. It is there said: "It cannot be reasonably supposed that it could be the intention of the testator to give only an estate for life, unless there be words clearly declaring such an intention."

That the general principle enunciated in *Ramsdell v. Ramsdell* was intended to apply only to a life-estate created by implication, is made more manifest in *Pickering v. Langdon*, 22 Me. 413, in which the court expressed its inability to extend into a fee an estate which was by the testator expressly described as being for a life-time. And it is in the latter case said, "The general intent to dispose of the whole of the property cannot therefore authorize the court to destroy or disregard the other and different purpose to give to Paul and his wife, estates for life." In *McLellan v. Turner*, 15 Me. 436, the same judge, who delivered the judgments in the two cases before named, said: "If it were admitted that a power of disposal existed she would not take a fee, there being an express devise to her for life."

In *Jones v. Bacon*, 68 Me. 34; s. c., 28 Am. Rep. 1, it was held that an absolute power of disposal in the first taker renders a subsequent limitation repugnant and void. But that was a case where the contention was whether the first taker had or not an estate for life by an implication from all parts of the will construed together. The language of the will there was, "As to the residue of my estate, I give and bequeath the same to my beloved wife." These are words of inheritance. It would have been a different thing

altogether, had the testator said, "I give and bequeath the same to my wife for her life-time." In that case the bequest was in general terms, unqualified, except by the limitation over ; while in the case at bar, the bequest is for a life-time only. *Jones v. Bacon* falls within the rule laid down in *Ramsdell v. Ramsdell, supra* ; although both cases are in conflict with the case of *Smith v. Bell*, 6 Pet. 68, a case differing somewhat from many of the authorities. See *Gifford v. Choate*, 100 Mass. 346.

In *Shaw v. Hussey*, 41 Me. 495, the doctrine is truly stated, that a devise of land to another, generally or indefinitely, with a power of disposing of it, amounts to a devise in fee ; but that where a testator gives to the first taker an estate for life, only by certain and express terms, the fee does not vest in the legatee. Other cases clearly illustrate the same rule. *Fox v. Rumery*, 68 Me. 121 ; *Warren v. Webb*, id. 133 ; *Jones v. Leeman*, 69 id. 489 ; *Starr v. McEwan*, id. 334. The question is most elaborately and exhaustively examined in cases in New York and New Hampshire, a reference to which saves the necessity of citing and comparing a long list of authorities. *Burleigh v. Clough*, 52 N. H. 267 ; s. c., 13 Am. Rep. 23 ; *Jackson v. Robins*, 16 Johns. 537. Some of the later English chancery cases cast light upon the question. *In re Stringer's Estate*, L. R., 6 Ch. Div. 1 ; *In re Hutchinson*, 8 id. 540 ; *White v. Hight*, 12 id. 751. The Massachusetts cases, when correctly understood, are not in opposition to the doctrine. Their latest case affirms it. *Ayer v. Ayer*, 128 Mass. 575.

The text books sustain the doctrine fully. Chancellor KENT says : "If an estate be given to a person generally or indefinitely, with a power of deposition, it carries a fee ; unless the testator gives to the first taker an estate for life only, and annexes a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee." 4 Kent Com. *535..

Cruise says, "Although a devise to a person generally, with a power to give and dispose of the estate as he pleases, creates an estate in fee simple ; yet where an estate is devised expressly for life, with a power of disposal, the devisee will only take an estate for life, with a power to dispose of the reversion." Cruise Dig., tit. 38, ch. 13, § 5.

Bacon says, that "devises by implication are allowed where the intention may be presumed, though it be not expressed in plain

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words ; yet there is no room for such construction where a devisee has an estate given him by express words in the will ; for that would be to overrule the plain meaning of the testator against his own words." Abr. Leg. and Dev. G.

In 1 Roper's Leg. *643, it is said : " Where a particular estate is limited in the instrument, followed by a declaration that the legatee may dispose of the fund, he will not take a beneficial interest in the capital. He will have a mere power to dispose of it, and no more ; because, where a limited interest is expressly given, its enlargement by implication will not be permitted."

Jarman says : " If there is a distinct, positive gift (to the primary legatee), and the intention is express, nothing that afterward follows can affect the construction of the positive gift." 1 Jar. Wills, 5th ed. (Bigelow) *873, and cases in notes. See *Ward v. Emery*, 1 Curtis, 425.

A doubt is raised by the defendants, whether in the present case there is a devise for life by express limitation. Nothing could be much plainer ; all her rights and powers are limited by her duration of life. The words " during her life-time " qualify all preceding words in that clause of the will ; affecting both the quantum of interest in the estate and the power of disposal. Any other construction would expunge from the will most of the provisions in it. The testator gives a fee in other instances in apt and proper terms, whenever he designs to do so. He appoints executors ; makes careful provisions appertaining to the expected remainder ; significant evidence of the intention. An estate for life is not for more than life, but for life only. The maxim *expressum facit cessare tacitum* governs.

We have no doubt that the estate devised to the wife, with all the income, increase and proceeds of it, real and personal, into whatever form appropriated or converted, so far as the same can be traced and identified, which remained unexpended at her death, should be surrendered, paid over and applied according to the prayer of the bill. That the same rule applies to the proceeds of the property sold by the widow, and not expended at the time of her death, as to the original property itself, is determined in *Hall v. Otis*, 7 Me. 326.

Demurrer overruled. Bill sustained ; with decree as indicated in opinion without costs.

Decree sustained.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

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NOTE BY THE REPORTER.—So, in *Copeland v. Barron*, 72 Me. 206, where a testator bequeathed to his father and mother and the survivor, a sum of money for their use and support during the term of their lives, the unexpended remainder at their death to go to his son, *held*, that the legatees took only a life-estate. The court said: "But upon two grounds the bequest must be regarded as giving an estate for life only, with a power of disposal, and not an absolute property. First, Because the gift is not absolute and entire in its terms, the power of disposition annexed being qualified and conditional, and not an absolute power. Second, Because, if an estate is given for life in express terms, it is not to be extended by implication arising from an annexed power of disposal, however unqualified. Implication is admitted in the absence of, and not in contradiction to, an express limitation *Stuart v. Walker*, 72 Me. 146.

"It is not probable that a testator would in the same instrument devise to a person an estate for life in express terms, and then give him the remainder of the same estate by implication. In *Popham v. Banfield*, Salk. 236, one of the earliest cases upon this question, the court said, 'there was a mighty difference between a devise to A. and if he die without issue then to B., and a devise to A. for life, and if he die without issue, then to B. Where a particular estate is devised we cannot, by any subsequent clause, collect a contrary intent inconsistent with the first by implication.' In the case at bar, any other construction would deprive the words 'during their natural life' of all meaning. These are words of limitation. The estate is not only a life-estate, but is expressly limited to life. Had the power of disposal been absolute and unconditional, as it is not, even then it could not have extended the legal estate that vested in the first takers. The privilege of disposition is a collateral gift of power, and not a gift of property. The life-estate and the remainder vested in the different devisees at the same moment. Nor can the remainder be prevented from coming to the possession of the ulterior takers except by a full exercise of the power to dispose of the gift. The case of *Stuart v. Walker*, *supra*, embodies a reference to numerous authorities in support of this position; and the late case of *Herring v. Barrow*, L. R., 13 Ch. Div. 144, a case exactly in point, should be added to the list. See same case in L. R., 14 Ch. Div. 263.

"*Ramaddell v. Ramaddell*, 21 Me. 288, a leading case among the authorities touching the construction of wills, is appealed to by the primary legatees in defense of their position. There seems to be some misapprehension as to the true purport and scope of the rules imposed by that case. The following propositions are there stated: 'It has become a settled rule of law that if a devisee or legatee have the absolute right to dispose of the property at pleasure, a devise over is inoperative. But where a life-estate only is clearly given to the first taker, with an express power, on a certain event or for a certain purpose, to dispose of the property, the life-estate is not by such power enlarged to a fee or absolute right; and the devise over will be good.'

"Where a devisee or legatee is spoken of in this language of that judgment, it has reference to cases where devises or legacies are made in general or indefinite terms, without words of limitation as where I devise you my farm or give you my ship, describing the object given, but without stating the nature or quantum of the estate, or what its duration is to be; that being a matter of implication to be gathered from all parts of the will. And where a life-estate is spoken of it refers to a life-estate arising by implication, and not to one expressly created or limited to life. It must be borne in mind that the discussion in that case related to a life-estate created by a rule of the common law in force in this State prior to the statutes of 1841. The Revised Statutes of 1841 provided that a devise of land should be construed to convey all the estate of the devisor therein, unless it appears by the will that he intended to convey a lesser estate. Prior to 1841, as to realty, the presumption was the other way. By the common law a devise in general terms, without words of inheritance added, was not efficacious to convey an estate in fee, unless the intention of the testator to that effect could be collected from that in connection with all other parts of the will. A general devise, the interpretation of which was unaided by any light cast upon it from other portions of the will, carried a life-estate by implication or by construction of law. An absolute power of disposal added thereto being equivalent to the use of words of inheritance, would enlarge such life-estate to a fee; while a qualified power of disposal would not have that effect. But now the opposite rule of construction or presumption prevails. Words of inheritance are now *prima facie* implied by a general

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or naked devise. From the nature of things any power of disposal added to such a devise cannot extend it. It now only serves to emphasize and repeat the gift. But a limited or special power of disposal annexed to a general devise, with limitation over, may restrain and limit the devise to the life-time of the devisee. It is evident enough that the rules laid down in *Ramsdell v. Ramsdell* do not apply to a life-estate expressly created where, as in the present case, the testator expresses his intention in direct and unambiguous terms.

"It is asserted by the learned counsel for the persons who claim as ulterior takers in the present case, that the case of *Ramsdell v. Ramsdell*, even as understood by us, cannot stand against the opposing case of *Smith v. Bell*, 6 Pet. 68. But the latter case, in its advanced position upon this question, has not been followed in this State, and is contrary to the authorities generally. *Bigelow's Overruled Cases*, 456; *Gifford v. Choate*, 100 Mass. 846; *Homer v. Shelton*, 2 Met. 201; *Albee v. Carpenter*, 12 Cush. 387." See *Reinders v. Kopplemann*, 68 Mo. 482; s. c., 30 Am. Rep. 802.

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(72 Me. 226.)

Corporation — constructive notice to.

A trustee of a bank, who was also an attorney, had actual knowledge of an existing unrecorded deed of lands. With that knowledge, he as such attorney afterward wrote and took an acknowledgment of a mortgage on the same lands from the same grantor to the bank, and the deed was recorded. *Held*, that the bank was not chargeable with his knowledge unless the fact was in his mind at the time, nor unless he was acting for the bank in the making of the mortgage. (*See note, p. 322.*)

WRIT of entry. The case is stated in the third and last paragraphs of the opinion. The defendant had judgment below.

Brown & Howard, for plaintiffs.

Walton & Walton, for defendant.

PETERS, J. A notice to a bank director or trustee, or knowledge obtained by him, while not engaged either officially or as an agent or attorney in the business of the bank, is inoperative as a notice to the bank. If otherwise, corporations would incur the same liability for the unofficial acts of directors that partnerships do for the acts of partners; and corporate business would be subjected oftentimes to extraordinary confusion and hazards. Carry the proposition, that notice to a director is notice to the bank, to its logical sequence, and a corporation might be made responsible for all

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the frauds and all the negligences pertaining to its business, of any and all its directors not officially employed. Any one director would have as much power as all the directors.

A single trustee or director has no power to act for the institution that creates his office, except in conjunction with others. It is the board of directors only that can act. If the board of directors or trustees makes a director or any person its officer or agent to act for it, then such officer or agent has the same power to act, within the authority delegated to him that the board itself has. His authority is in such case the authority of the board. Notice to such officer or agent or attorney, who is at the time acting for the corporation in the matter in question, and within the range of his authority or supervision, is notice to the corporation. Abb. Trial Ev. 45, and cases in note; *Fulton Bank v. Canal Co.*, 4 Paige, 127; *La Farge Fire Ins. Co. v. Bell*, 22 Barb. 54; *National Bank v. Norton*, 1 Hill, 578; *Bank of U. S. v. Davis*, 2 id. 454; *North River Bank v. Aymar*, 3 id. 263; *Ins. Co. v. Ins. Co.*, 10 Md. 517; *Bank v. Payne*, 25 Conn. 444; *Farrell Foundry v. Dart*, 26 id. 376; *Smith v. South Royalton Bank*, 32 Vt. 341; *Washington Bank v. Lewis*, 22 Pick. 24; *Commercial Bank v. Cunningham*, 24 id. 270; *Housatonic Bank v. Martin*, 1 Metc. 308; 1 Pars. Cont. *77; Story Agency, § 140; *Hoover v. Wise*, 91 U. S. 308.

Another question arises in the case before us. It appears that Brown's knowledge of a previous conveyance was acquired anterior to his employment by the bank, if employed by the bank at all, and not during or in the course of his employment on their account. The question is, whether a principal is bound by knowledge or notice which his agent had previous to his employment in the service of the principal.

Upon this question the authorities disagree. The negative of the question has been uniformly maintained in Pennsylvania and some other of the States. In the late case of *Houseman v. Building Association*, 81 Penn. St. 256, it was said, that "notice" to an agent twenty-four hours before the relation commenced is no more notice than twenty-four hours after it has ceased would be." But we think, all things considered, the safer and better rule to be that the knowledg of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must

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be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him ; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal ; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it. Additional modification might be required in some cases.

These elements appearing, it seems just to say that a previous notice to an agent is present notice to the principal. The presumption, that an agent will do what it is his right and duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied. There may be instances where the rule operates harshly ; but under the rule reversed, many frauds could be easily perpetrated. Of course the knowledge must be that of a person who is executing some agency, and not acting merely in some ministerial capacity, as servant or clerk. For instance, if in the present case Brown had merely taken the acknowledgment of the deed to the bank, or had transcribed the deed as a clerk or copyist, such acts would not have imposed a duty to impart his knowledge to the bank. But if employed to obtain the title for the bank by a deed to be drawn by him for the purpose, that would place the transaction within the rule. *Jones Mort.* (2d ed.), § 587. Notice of the existence of an unrecorded mortgage upon the property to an officer, employed to make attachment, is notice to the plaintiff. *Tucker v. Tilton*, 55 N. H. 223. In the case before us, Brown, it is claimed by the defendant, was employed by the bank to make an instrument to convey a title from a person to the bank. Brown knew that such person had not the title. It would be his duty to so inform his client. He would be likely to do so. He had no motive not to do it. The law conclusively presumes that he did inform him. We think such a case comes reasonably within the rule, though it is not so marked a case as it would be if Brown had been employed by the bank to ascertain if the grantor had the title, and if he had, then to make the deed.

The general rule or principle touching this case, guarded by the cautions and conditions stated, is supported by the later English cases, although the earlier English cases went the other way ; is also the law of the United States Supreme Court ; and is, we think, sustained by a preponderance of opinion in the State courts where

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the question has been discussed. *Fuller v. Bennett*, 2 Hare, 394; *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Rolland v. Hart*, L. R., 6 Ch. App. 678; *The Distilled Spirits*, 11 Wall. 356; *Hovey v. Blanchard*, 13 N. H. 148; *Hart v. Bank*, 33 Vt. 252; *Suit v. Woodhall*, 113 Mass. 391; *National Bank v. Cushman*, 121 id. 490; *Anketel v. Converse*, 17 Ohio St. 11; *Hoppock v. Johnson*, 14 Wis. 303; *Lawrence v. Tucker*, 7 Me. 195; Jones Mort. (2d ed.), § 584, and following sections and notes. Many other cases on both sides of the questions, will be found cited and reviewed in a learned article in 16 Am. Law Reg. (N. S.) 1.

An application of this rule to the facts of this case requires the verdict to be set aside. S. S. Brown, while a trustee of the Fairfield Savings Bank, had actual knowledge that John W. Chase had deeded certain land to Isaac Chase. Knowing that fact, he as an attorney wrote and took the acknowledgment of a mortgage of the same land from John W. Chase to the bank, and the mortgage was recorded first. The question was whether the bank had knowledge of the prior deed when the mortgage was taken. The *pro forma* ruling that the knowledge of Brown was sufficient notice to the bank to overcome the legal effect of the fact that the mortgage was recorded before the deed, irrespective of the further question whether Brown was, at the time of making the mortgage, acting as an attorney in the business and employment of the bank or not, was erroneous. It is contended that the evidence shows that Brown was acting for the bank. But the fact being at least questionable, it should have been passed upon by the jury.

Exceptions sustained.

APPLETON, C. J., WALTON, BARROWS, DANFORTH, and SYMONDS, JJ., concurred.

NOTE BY THE REPORTER.—See *Texas Banking Co. v. Hutchins*, 53 Tex. 61; s. c., 37 Am. Rep. 750; *Haywood v. Nat. Ins. Co.*, 52 Mo. 181; s. c., 14 Am. Rep. 400; *Congar v. Chic. & N. W. Ry. Co.*, 24 Wis. 157; s. c., 1 Am. Rep. 164; *City of Loganport v. Justice*, ante.

In the principal case two questions arose; *first*, as to the requisites of notice to a corporation through its agents; *second*, as to the imputability to the principal of the knowledge of the agent acquired in another transaction. The latter question is affected in cases of attorney and client by the confidential character of the relation, and this is still further complicated where the same attorney acts for both parties. We shall glance at the principal authorities on these exact points, laying aside a considerable number in which they are not directly decided, and many more only laying down the familiar general proposition that notice to the agent is notice to the principal. Our review will include the citations of the counsel and the court in the principal case, which have any applicability, and many others not cited in this case. And first for the English authorities:

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In *Brotherton v. Hatt*, 3 Vern 574, it was held that where several securities were transacted by the same scrivener for the same parties, notice to him was notice to the parties.

In *Preston v. Tubbin*, 1 Vern. 287, the lord keeper said: "Though notice to a man's counsel be notice to the party, yet where the counsel comes to have notice of the title in another affair, which it may be he has forgot, when his client comes to advise with him in a case with other circumstances, that shall not be such a notice as to bind the party."

In *Warrick v. Warrick*, 3 Atk. 294, Lord HARDWICKE said: "It would be a pretty harsh thing to affect the lender of money with all kind of knowledge which the agent may have of the title of borrower; but still I will not lay it down as a general rule that where the same person is concerned for the mortgagor and mortgagee, notice to such person will not be good constructive notice to the mortgagee. But consider what kind of notice the defendant Kniveter had: Mr. Hawkins had not notice at the time of the assignment, nor relative to this business, but before; even before the original mortgage. In the case of *Fitzgerald v. Falconberg*, Fitzg. 211, it was held the notice should be in the same transaction. This rule ought to be adhered to, otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions." So in *Worsley v. Earl of Scarborough*, id. 332, his lordship said: "It is settled that notice to an agent or counsel who was employed in the thing by another person, or in another business, and at another time, is no notice to his client, who employs him afterward; and it would be very mischievous if it was so, for the man of most practice and greatest eminence would then be the most dangerous to employ." And so in *Lowther v. Carlton*, 3 id. 242, he said: "If a counsel or attorney is employed to look over a title, and by some other transaction, foreign to the business in hand, has notice, this shall not affect the purchaser; for if this was not the rule of the court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more likely than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind." And to the same effect was his lordship's judgment in *Steed v. Whittaker*, Barnard, 220.

In *Crosse v. Smith*, 1 M. & S. 545, it was held by Lord ELLENBOROUGH, that persons who are bankers both for the drawers and acceptors of a bill, and have received it from the drawers, and given credit for it in an account current between them, if before it becomes due they receive directions from the acceptors to stop the payment of it at the place of payment, and do so accordingly, are not bound to give notice of this circumstance to the drawers, but upon non-payment of the bill may look to the drawers notwithstanding they have not given such notice. He said, "they acted confidentially, and were not at liberty to communicate the orders of Tuke without betraying their trust."

In *Le Neve v. Le Neve*, 3 Atk. 646, Lord HARDWICKE said, *obiter*: "In purchases, and more especially in mortgages, very frequently the same counsel and agents are employed on both sides, and therefore each side is affected with notice, as much as if different counsel and agents had been employed." But this is said of information coming in the course of transaction. This case is followed by Sir WILLIAM GRANT, in *Toulmin v. Steere*, 3 Meriv. 209.

In *Hein v. Mill*, 13 Ves. 118, Lord Chancellor ERSKINE seems to have adopted HARDWICKE's theory, for he defines constructive notice as "if the agent comes to the knowledge of the fact, while he is concerned for the principal and in the course of the very transaction which becomes the subject of the suit."

In *Mountford v. Scott*, 3 Madd. 34, Vice Chancellor LEACH, held that notice to an agent, in order to bind the principal, must be in the same transaction, although the agent acted as attorney for both parties in the transaction. He said: "He cannot stand in the place of the principal, until the relation of principal and agent is constituted, and as to all the information which he has previously acquired the principal is a mere stranger." This is Lord HARDWICKE's doctrine. But on appeal, Lord Chancellor ELDON said — although he affirmed the decree, "The vice-chancellor in this case appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction. In that view of the case it might fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an

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attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening ; it must in all cases depend upon the circumstances."

This doctrine was followed by Lord LANGDALE, master of the rolls, in *Hargreaves v. Rothwell*, 1 Keen, 154. He said that Lord ELDON's observations in *Mountford v. Scott* were *obiter*, but he also said "he was clearly of opinion that where one transaction was closely followed by and connected with another ; or where it was clear, as in the case, before the court, that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there was no ground for the distinction by which the rule, that notice to the solicitor is notice to the client, had been restricted to the same transaction."

In *Kennedy v. Green*, 3 Myl. & K. 699, it was held, by Lord Chancellor BROUGHAM, that where one solicitor is employed by both parties to a transaction, and himself commits a fraud in the course of it, knowledge of this fraud is not imputed to the party defrauded. The chancellor said : "The doctrine of constructive notice depends upon two considerations, first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy and the safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the time let his agent know, and himself perhaps profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not." He adhered to *Mountford v. Scott*, and *Hein v. Mill*, *supra*, but distinguished this on the ground that the solicitor's knowledge was such as could not be presumed to have been communicated.

In *Dresser v. Norwood*, 17 C. B. (N. S.) 466, it was briefly held, "that in a commercial transaction, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal."

In *Rolland v. Hart*, L. R., 6 Ch. App. 678, a solicitor induced a client to advance money for A. on mortgage, and afterward induced a second client to advance money on the same land, without informing him of the first mortgage. *Held*, that notice was imputed to the second mortgagee. Lord Chancellor HATHERLEY said : "Mankind would not be safe if it were held, that under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has in ordinary cases no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor. It cannot be left to the possibility or impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that, which according to the terms of your employment of him, was the very thing which you employed him to ascertain." Distinguishing *Kennedy v. Green*, *supra*, on the ground "that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him."

In *Fuller v. Bennett*, 2 Hare, 394, A. had proposed to sell land to B., and subsequently agreed to give C. a mortgage on it, and notified B.'s solicitors. The negotiations were suspended five years on account of a litigation about the land. A. died and B. bought the land from his heir, and mortgaged it to D. The same solicitors acting throughout for B. *Held*, that B. and D. had constructive notice of the agreement with C. SHADWELL, V. C., said : "It was argued for the plaintiffs, that where one out of two matters, transacted by the same solicitor, follows so close upon the other that the earlier transaction cannot have been out of the mind of the solicitor when engaged in the latter, there is no ground for restricting the notice to the client to the second transaction only, and that he will be affected with notice of both." "According to the plaintiff's argument upon this part of the case, carried to its full extent, the question is one of memory only on the part of the solicitor, irrespective of the circumstance which has entered into all the cases cited for the plaintiffs, that the same solicitor was employed by both parties, the vendor and the

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purchaser. According to the defendant's argument, the knowledge which the solicitor has must be acquired after and during the retainer, or it will not affect the client. I am certainly not prepared to accede to either proposition to the full extent.

"Cases may easily be suggested in which it would be impossible that a solicitor should have forgotten a fact recently under his view, with notice of which however it would be impossible to affect his client, unless the circumstance of his being solicitor for two parties be introduced into the case. And it is equally clear, where that circumstance forms part of the case, that a purchaser may be affected with notice of what the solicitor knew as solicitor for the vendor, although as solicitor for the vendor he may have acquired his knowledge before he was retained by the purchaser. Whatever the solicitor, during the time of his retainer, knows as solicitor for either party, may possibly in some cases affect both, without reference to the time when his knowledge was first acquired. If therefore in order to decide the cause now before me, it were strictly necessary that I should decide, as an abstract question, that a purchaser, who for the first time employs a solicitor (not also being the solicitor of the vendor), can be affected with constructive notice of any thing known to the solicitor, save that of which the solicitor acquires notice after his retainer, and during his employment by the purchaser, I should certainly feel great difficulty in coming to the conclusion. The rule that notice to the solicitor will not bind the client, unless it be in the same transaction, or at least during the time of the solicitor's employment in that transaction, I have always understood to be a rule, *positivi juris*, adopted by courts of justice in favor of innocent purchasers; and the reason and policy of the rule appears to me to show that such is the case. 'It is settled,' says Lord HARDWICKE, 'that notice to the agent or counsel who was employed in the thing by another person, or in another business and at another time, is no notice to his client who employs him afterward. It would be very mischievous if it was so; for the men of most practice and greatest eminence would then be the most dangerous to employ.' 3 Atk. 392. The expression commonly used in explaining the rule, namely, that the agent may have forgotten the former transaction, points at the same conclusion; and I cannot think that Lord ELDON, in the language he used extra-judicially in *Mountford v. Scott*, 3 Madd. 34, intended to shake the general doctrine which himself, as well as Lord HARDWICKE and other judges, had so often insisted upon. It is not necessary so to understand Lord ELDON's language when construed with reference to the circumstances of the case before him. The rule limited as above is, I presume to say, best adapted to and fully sufficient for the purposes of justice." But the ruling was put on the ground that "it was one continuous dealing with the same title. If as solicitor for the mortgagor he had such notice in the new transaction, he had it in that new transaction as solicitor for both."

The American cases are more conflicting. And first, as to the question as affected by the relation of attorney and client, Lord HARDWICKE's doctrine was early held in this country, and seems generally adhered to.

In *Houseman v. Girard Mut. B. & L. Association*, 81 Penn. St. 236, L., desiring a loan from plaintiffs, to be secured by mortgage on his property, plaintiffs' conveyancer ordered searches for liens; through L. he procured a certificate from the recorder that there were no mortgages on the property; on this the loan was made. There being prior mortgages given by L. not certified, on the sale of L.'s property by the sheriff the proceeds did not reach to pay the loan. Held, that the recorder was liable to plaintiffs for the loss, and the employing L. to procure the certificate did not affect the plaintiffs with his knowledge. The court observed: "It is urged that by the employment of the owner as the agent for this purpose the defendants are affected with this knowledge of the existence of the mortgage, which was omitted in the certificate. This is a very familiar principle and well settled. But it is equally well settled that the principal is only to be affected by knowledge acquired in the course of the business in which the agent was employed. This limitation of the rule is perfectly well established by our own cases, and it is not necessary to look further. *Hood v. Fahnstock*, 8 Watts, 489; *Bracken v. Miller*, 4 W. & S. 110; *Martin v. Jackson*, 3 Casey, 508. It is a mistake to suppose that it depends upon the reason that no man can be supposed to always carry in his mind a recollection of former occurrences, and that if it be proved that he actually had it in his mind at the time, the rule is different. It may support the reasonableness of the rule to consider that the memory of men is fallible in the very best, and varies in different men. But the true reason of the

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limitation is a technical one, that it is only during the agency that the agent represents and stands in the shoes of his principal. Notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be. Knowledge can be no better than direct actual notice. It was incumbent on the plaintiff to show that the knowledge of the agent, to use the accurate language of one of our cases, 'was gained in the transaction in which he was employed.' There was not only no evidence of this offer by the plaintiff, but it was plain that it had been gained before, and in an entirely different transaction."

In *Hood v. Fahnestock*, *supra*, the question was of imputed knowledge by an attorney of a former deed drawn by him between other parties, and the court said: "It is now well settled that one, if in the course of his business as agent, attorney or counsel for another, obtained knowledge from which a trust would arise and afterward became the agent, attorney or counsel of the subsequent purchaser in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. The reason is that no man can be supposed to carry always in his mind a recollection of former occurrences; and moreover, in the case of attorney or counsel, it might be contrary to his duty to reveal the confidential communications of his client."

In *Willis v. Vallette*, 4 Metc. (Ky.) 186, it was held, that notice to an agent is constructive notice to his principal, only when acquired in the course of the transaction in which he is acting as agent. To the same effect, *Howard Ins. Co. v. Halsey*, 8 N. Y. 271.

In *McCormick v. Wheeler*, 36 Ill. 114, it was held, that a party cannot be charged with notice of facts within the knowledge of his attorney, of which the latter acquired knowledge while acting as attorney for another person. The court said: "The English courts have recently manifested a disposition to depart from this rule, but we deem it a principle just in itself, and founded on wise considerations of policy."

In *Ford v. French*, 72 Mo. 250, it was briefly held that the knowledge acquired by an attorney while acting for one client, will not affect another client, for whom he is acting at the same time in a different case. But on the other hand: In *Donald v. Beals*, California Supreme Court, April, 1881, two mortgages, one to D. and one to N., were deposited in a county clerk's office for record, April 15, the one to D. at four o'clock, and the one to N. at five o'clock. By a clerical mistake it was noted on the D. mortgage that it was deposited on April 18. This mistake occurred in the record book and in the certificate annexed to the mortgage. N. sold and assigned her mortgage to C. who employed an attorney to examine as to the character of the security. C. did not examine the record, but his attorney had full knowledge that the mortgage to N. was not prior in record. The attorney acted both for C. and N. Held, that his knowledge was imputable to C. The knowledge of an attorney is the imputed knowledge of his client. It is a well-settled doctrine of English law, that if the agent, at the time of effecting a purchase, have knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. Citing *The Distilled Spirits*, 11 Wall. 367.

As to the question of notification to a corporation through an agent, the American cases are as follows:

In *Commercial Bank v. Cunningham*, 24 Pick. 270, it was held that the circumstance that the indorser of a discounted note was a director of the discounting bank, is not constructive notice to the bank that the note was made for his accommodation.

In *Washington Bank v. Lewis*, 22 id. 24, a bank director got possession of a note for discount for the owner, and instead he pledged it to the bank for his own debt. Held, that as he did not act in his capacity of director in procuring the discount, the bank was not affected by his knowledge of the circumstances under which he procured it. The court said: "The argument is, that though Thompson was not the agent of the bank, yet as he was a director, his knowledge of the facts under which the note was procured is the knowledge of the bank. If this argument could be maintained, it would follow, that if a director should procure a note to be discounted by the fraudulent concealment of material facts, which he was bound to disclose, or even by false pretenses, the bank would have no remedy. If Thompson had been authorized to discount this note, and did discount it, the argument might hold good. Whatever a director or other agent of a bank may do within the scope of his authority, would bind the bank so as to make them responsible to the

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person dealt with. But in the present case, Thompson was the party applying for the discount, and was not acting as director, nor could he with any propriety so act."

In *National Bank v. Norton*, 1 Hill, 572, it was held that notice of dissolution of a partnership, published in a newspaper, and thus accidentally reaching one of several directors of a bank, is not equivalent to actual notice to the bank. Cowen, J., said: "He happened to know the fact of dissolution, as a director or other corporator may do, with perhaps being aware that the bank could be prejudiced by it. Not having any intimation that it was material, it is too much, even if the point were in the case, to insist on a presumption that he ever communicated the fact to the board. Not having acquired the knowledge as director, there is no room for presumption either on the ground of duty or intent."

In *Bank of United States v. Davis*, 2 Hill, 451, where a bill of exchange was sent to a director of a bank to be discounted for the benefit of the drawer, and the former, who was a member of the board who ordered the discount to be made, received the avails, alleging that the discount was for his own benefit, *held*, that the bank was chargeable with knowledge of the fraud. The court said: "The general rule is undisputed that notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for the principal in the course of the very transaction which becomes the subject of the suit; for upon principles of general policy it must be taken for granted that the principal knows whatever the agent knows." "I agree that notice to a director, or knowledge derived by him while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions." The same doctrine was recognized *obiter* in *North River Bank v. Aymar*, 3 Hill, 262, 273.

In *Fulton Bank v. N. Y. & Harlem Canal Co.*, 4 Pal. 127, the court said: "There can be no actual loss to a corporation aggregate except through its agents or officers. The directors or trustees, when assembled as a board, are the general agents upon whom a notice may be served, and which will be binding upon their successors and the corporation. But notice to an individual director, who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. The notice which Brown and Cheesebrough had of what took place at the house of the former, on the evening of the 7th of September, was not of itself legal notice to the bank that the fund was placed under the control of the finance committee; and that Brown, although he left his signature and apparently had the control of the money the next morning, was not in fact authorized to draw it from the bank. But if Cheesebrough had been authorized by the bank, as their president and agent, to agree to receive the money on deposit, the agreement made with him, as such agent, would have been notice to the corporation, although he neglected to communicate the facts to the other officers of the bank, or to the board of directors. It is well settled that notice to an agent of a party, whose duty it is, as such agent, to act upon the notice, or to communicate the information to his principal, in the proper discharge of his trust as such agent, is legal notice to the principal. And this rule applies to the agents of corporations as well as others.

In *La Farge Ins. Co. v. Bell*, 22 Barb. 54, it was held that an insurance company taking mortgages subsequent in date to an unrecorded deed of the same premises, is not chargeable with constructive notice of such deed from the fact that the grantor and mortgagor was at the date of both deed and mortgage a director in the insurance company. The court said: "If his position as a director could make him the agent, or rather identify him entirely with the plaintiffs in such sort as to charge them with constructive notice of all the facts with which he was personally acquainted, as to the title to lands in which they had any interest, in any case, it cannot be so when he did not become concerned as their especial agent or transact business in their behalf. Most clearly it cannot be the case where the facts concerned his own private affairs, and the transaction was one in which he was dealing with the company as a third party on his own behalf, and acting for himself with and against them."

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In *General Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517, it was held that notice given to a director of a corporation, privately, or which he acquires from rumor, or through channels open to all alike, and which he does not communicate to his associates at the board, will not bind the corporation.

In *Farmers and Citizens' Bank v. Payne*, 25 Conn. 444, it was held, the knowledge of a bank director, as to the object for which commercial paper was delivered to a party offering it to the bank for discount, the director not being present when it was offered and discounted, and not having communicated his knowledge to any other director or officer, was not notice to the bank. The court said: "The general rule on this subject is that notice of a fact to an agent is notice to the principal, if the agent has knowledge of it while he is acting for the principal in the course of the transaction which is in question. And this rule is applicable equally to corporations and natural persons. Hence, knowledge of a material fact, imparted by a director of a bank to the board of directors at a regular meeting of them, is obviously notice to the bank. It has also been decided in some cases, that notice to either of the directors, while engaged in the business of the bank, is notice to the bank. Whether however the knowledge of a director, who is present at a meeting of a board of directors, when paper is discounted on his application and for his benefit, is, under the rule which has been stated, to be imputed to the bank, is a question on which there is a diversity of opinion, but one which it is unnecessary here to determine. Whether such knowledge should be treated as notice to the bank in that case would probably depend on the question whether the director should be deemed to have been acting as a director and in behalf of the bank when the transaction took place. And it is upon that point only that the difference of opinion, which has been alluded to, arose. In all of the cases where the question was whether the principal was to be affected by the knowledge of his agent, the latter possessed such knowledge while he was acting for the former. There is none in which it has been held, or indeed claimed, that such knowledge would have that effect while he was not so engaged, nor can we conceive any good reason for the adoption of such a principle." So, in *Farrell Foundry v. Dart*, 26 id. 376, where a defective deed had been recorded, and a director of a corporation not acting as an agent thereof, and having no management of its business otherwise than as director, went to the town records to ascertain the situation of the land, and there saw the record of the deed, but did not inform the corporation or any of its agents, *held*, that the corporation was not by reason of these facts chargeable with knowledge of the deed.

The doctrine of *Farmers and Citizens' Bank v. Payne*, *supra*, is declared in *Louisiana State Bank v. Senecal*, 13 La. 525.

In *Housatonic & Lee Banks v. Martin*, 1 Met. 294, it was held that knowledge of facts by a mere stockholder in an incorporated manufacturing company or bank is not notice to the corporation of the existence of those facts. In this case the stockholder was the attorney who drew the mortgages and assignment in question.

In *Smith v. South Royalton Bank*, 32 Vt. 341, it was held that if a bank director acts in behalf of the bank in a transaction of which the bank takes the benefit, notice to the director at the time of any fact material to the transaction is notice to the bank.

In *Tagg v. Tennessee Nat. Bank*, 9 Heisk. 479, the court observed: "But is the next proposition laid down by the judge maintainable as law? He says if Rutter, though president, acquired his knowledge of the defect in the note while acting in his individual capacity and not as president and afterward, when the note was discounted, failed to communicate his knowledge, and thereby perpetrated a fraud on the bank, his concealment of his knowledge would not operate as constructive notice to the bank, but that the bank could recover on the note against the defendant, although he was innocent of the fraud. It would be exceedingly difficult to find a substantial ground on which to rest the distinction taken in the two cases stated. In the one the agent obtains his knowledge while acting for his principal. If he fails afterward to communicate his knowledge when acting further for his principal, his principal is bound as fully as if the communication had actually been made. This is settled on principles of public policy. Why, then, if the agent, in acting for himself, becomes possessed of knowledge as to a transaction which affects his principal, is he not bound to communicate that knowledge when it becomes his duty afterward to act in his agency in reference to the very transaction about which he obtained knowledge that would affect his principal? In

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each case he is under all the obligations of an agent, and in each case he has knowledge which involves the interest of this principal. Surely there is no reason why the obligation to disclose his knowledge is not as strong, when he derives that knowledge in a transaction for his own benefit, as in a transaction for the benefit of his principal.

"We are sustained in this view in the case of the *Union Bank v. Campbell*, 4 Humph. 396. In that case suit was brought against a member of a firm on a note executed after the dissolution by another member. The fact of dissolution was known to two of the directors of the bank who were present when the note was discounted. They had derived this knowledge from having seen the publication of the dissolution in a newspaper. When the note was discounted neither of the two directors communicated his knowledge of the dissolution, and the bank discounted the note in ignorance of the fact. After holding that a director of a bank is an agent, Judge GREEN said: 'All that is necessary is that the director, acting in the board when the note is offered for discount, should have knowledge of the dissolution. If he have such knowledge he is bound to communicate it to the board.' We do not intend to controvert the general doctrine that 'notice must come to an agent while he is concerned for the principal, and in the course of the same transaction;' for notice to a party while he is not acting as agent is certainly no notice to a principal for whom he may afterward act. But the existence of *knowledge* in an agent, when acting for his principal, is notice to the principal, however that knowledge may have been acquired. The material fact therefore which binds the principal is the *knowledge* which the agent possesses when he comes to act, and the principal is bound in such case whether the knowledge is communicated or not, and without regard to the manner in which the agent acquires his knowledge.

"In the case of the *Bank of the United States v. Davis*, 2 How. 461, relied on by Judge GREEN in the case of the *Union Bank v. Campbell*, Judge NELSON said: 'The general rule is undisputed, that notice to the agent is notice to the principal, if the agent comes to the knowledge of the fact while he is acting for the principal in the course of the very transaction which becomes the subject of the suit; and in answer to the argument that the agent was acting for himself and not for his principal in the perpetration of the fraud, he said: 'It is not true in point of fact, that Williams (the director), was not acting in behalf of the bank at the time of the transaction in question. He was present as one of the board of directors, engaged in the business of consulting and advising with his associates in respect to the character of the paper presented for discount; and advised, and doubtless recommended, in his character and capacity as such director, the bills in question to the favorable notice of the board. It is no answer therefore to say that Williams is not to be regarded as acting in his capacity of director in behalf of the bank, but for himself, while engaged in perpetrating the fraud.'

"In that case the drawer of a note, desiring to raise money, executed his note and handed it to Williams, one of the directors of the bank, to be presented for discount. He took the note, indorsed it himself, recommended its discount, concealing the fact that the proceeds were intended for the maker, and upon its being discounted, he drew the money and used it himself. The bank sued the maker, but failed, because the bank was affected with constructive notice of the fraud.

"It is observed that in that case the bank was in fact innocent of any fraud, as was also the maker of the note. The question was, as between these two innocent parties, which should bear the loss? On this question, Judge NELSON states the reason of the rule which throws the loss on the bank. He says: 'The bank appointed the director and thus held him out to their customers and the public as entitled to confidence. They placed him in a position where he was enabled to commit the fraud. Hence as a matter of public policy the loss ought to fall on the bank. In the case before us the Circuit judge reversed the rule, and held that the maker ought to bear the loss, because, though innocently, he put it in the power of the president of the bank to perpetrate a fraud.' See also *Fullon Bank v. N. Y. Shannon Canal Co.*, 4 Paige, 187."

In *National Security Bank v. Cushman*, 121 Mass. 490, it was held, that if a bank director, who acts for the bank in discounting a note, knows that it was procured by fraud, the bank is affected with his knowledge. Citing *Suit v. Woodhall*, *supra*, and *Bank of U. S. v. Davis*, 3 Hill, 461.

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In conclusion we will look at a few cases of agency, not involving corporate relations or those of attorney and client, which illustrate this topic :

In the leading case of *The Distilled Spirits*, 11 Wall. 358, it was held that the rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence. BRADLEY, J., said : "The question how far a purchaser is affected with notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase, is one that has been much mooted in England and this country. But Lord HARDWICKE thought that the rule could not be extended so far as to affect the principal by knowledge of the agent acquired previously in a different transaction. *Warrick v. Warrick*, 3 Atk. 291. Supposing it to be clear that the agent still retained the knowledge so formerly acquired, it was certainly making a very nice and thin distinction. Lord ELDON did not approve of it. In *Mountford v. Scott*, 1 Turner & Russ. 274, he says : 'It may fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening ; it must in all cases depend upon the circumstances.' The distinction taken by Lord HARDWICKE has since been entirely overruled by the Court of Exchequer Chamber, in the case of *Dresser v. Norwood*, 17 C. B. (N. S.), 468. So that in England the doctrine now seems to be established, that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time ; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that the principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to the principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as for example, when it has been acquired confidentially as attorney for a former client in a former transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients. This difficulty presented itself to Lord HARDWICKE's mind, and undoubtedly lay at the bottom of the distinction which he established. Had he confined it to such cases it would have been entirely unexceptionable. The general tendency of decisions in this country has been to adopt the decision of Lord HARDWICKE, but it has several times been held, in accordance with Lord ELDON's suggestion, that if the agent acquired his information so recently as to make it incredible that he should have forgotten it, his principal will be bound. This is really an abandonment of the principle on which the distinction is founded. *Hovey v. Blanchard*, 13 N. H. 145 ; *Patten v. Ins. Co.*, 40 Id. 375. The case of *Hart v. Farmers and Mechanics' Bank*, 33 Vt. 252, adopts the rule established by the case of *Dresser v. Norwood*. Other cases, as that of *Bank of U. S. v. Davis*, 2 Hill, 452 ; *N. Y. Cent. Ins. Co. v. Nat. Prot. Co.*, 28 Barb. 468, adhere to the more rigid view. On the whole, however, we think that the rule as finally settled by the English courts, with the qualification above mentioned, is the true one, and is deduced from the best consideration of the reasons on which it is founded."

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In *Hovey v. Blanchard*, 13 N. H. 145, an owner of land conveyed it. The next day he carried a letter, directed to an attorney, inclosing for collection a demand against himself, to the attorney's residence, and ascertaining that he was absent, requested a deputy sheriff to open the letter, make a writ upon the demand, and attach the land so conveyed. *Held*, that the creditor, if he would avail himself of the attachment, must be charged with knowledge of the conveyance.

The question of constructive notice was alluded to, but not passed upon in *Stanley v. Chamberlain*, 39 N. J. 565.

In *Ingalls v. Morgan*, 10 N. Y. 178, where the agent of a judgment creditor was present at a sale, by the debtor to a third party, of certain lands on which the judgment was a lien, drew the conveyance and was informed of the terms of sale, and the debtor soon after delivered to such agent, as security for the judgment debt, the notes given in payment for the land conveyed, *held*, that the creditor was chargeable with constructive notice of the facts.

Story (Agency, § 140) adopted the older English doctrine, saying: "Notice therefore to the agent, before the agency has begun or after it has terminated, will not ordinarily affect the principal." This however was written before *Dresser v. Norwood* was decided.

A writer in the American Law Register, vol. 16, new series, page 1, treats this topic learnedly, and comes to the conclusion: "All that the agent has notice of will be imputed to the principal," except. "1. What the agent has forgotten entirely, or may have forgotten during the agency. 2. What he could not tell his principal, *e. g.*, professional confidences. 3. * * * Facts which the previous conduct of the agent makes it certain he will conceal." These conclusions, which are substantially those of the principal case, are probably correct.

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(72 Me. 313.)

Negligence — wharf-owner — contributory negligence.

A customs officer, searching for smugglers at a wharf where foreign vessels discharged, having no lantern, fell into the water through an opening left unguarded and unlighted in the wharf by the owner, and was injured. *Held*, that he could maintain an action therefor. (*See note*, p. 337.)

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

D. W. Fessenden and Webb & Haskell for plaintiff.

J. and E. M. Rand, for defendant.

BARROWS, J. The counsel for defendants, while recognizing as sound law the general principle that "an owner is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation express or implied, by which they have been led to enter

therein," stoutly contend that this custom-house officer, who on the night of the accident was upon the defendants' wharf, in the regular course of his duty to watch for smugglers and prevent smuggling from the steamer which was just hauling into the dock there from a foreign port, had no such invitation, but was a mere licensee. We cannot so regard him. His presence there was made necessary by the business to which the defendants had devoted their wharf, the reception of cargoes from foreign going vessels.

Plaintiff contends (and we think rightly both upon fact and law) that "the true statement of their (defendants') use and maintenance of the wharf is, that it was a wharf for the mooring of ships or vessels coming into port with cargoes from foreign lands, and subject to the regulations prescribed by law for such vessels. By putting their wharf to that use they assumed the responsibility of keeping it in a proper and suitable condition for the safe access of all persons whom that use required to come upon it. The business to which they devoted their property under the laws of the United States called for the presence of the plaintiff (a night inspector at the custom house) there." His business was with a vessel which had arrived from a foreign port within the jurisdiction of the United States, and was not fully unladen, and his duty was to attend to every kind of commodity which might be on board. His right to visit the premises while that vessel was there was not merely the right of visiting in reference to the business for which the premises could lawfully be used. One of the most important portions of his duty was to go there to prevent the use of the premises illegally. He might lawfully conduct his visits as to time and manner in the way best calculated to detect and prevent smuggling.

If it were ever possible, it is too late now to attempt to limit the liability in such cases, as defendants' counsel would have us, strictly "to persons coming there to transact the business to which the wharf was appropriated." Numerous authorities go further and charge the owner with a duty to those who come on his premises on legitimate business connected by no means directly with that to which the structure is appropriated.

Thus one who came only to vend his wares to the officers of a vessel lying in a dock was regarded as entitled to the protection of an implied invitation from the Docks company, though it was urged that he was not on board on the ship's business. *Smith v. London & St. Catherine's Docks Co.*, L. R., 3 C. P. 326.

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In *Stratton v. Staples*, 59 Me. 95, the only errand which the plaintiff had at the drug store was to inquire for the defendant's place of business, which she had passed in the darkness before coming to the insufficiently guarded roll-way into which she fell. She had no occasion to go to the drug store to "transact the business to which it was appropriated."

A railroad company owe a duty in the manner of making the access to their station safe to the hackman plying his vocation there to meet the trains as well as to the passengers from whom they derive a profit. *Tobin v. P. S. & P. R. R. Co.*, 59 Me. 183; s. c., 8 Am. Rep. 415.

So do the owners of a private wharf to one employed to carry the mail from a steamboat to whose proprietors the owners of the wharf had let a part of it; and this not on the ground of any contract between them and the plaintiff, but because of the duty which the law imposed upon them to make and keep their wharf safe for all who were on it for a lawful business purpose, so long as they should permit it to be open and used. *Wendell v. Baxter*, 12 Gray, 494, citing, *Collett v. London & N. W. Railway Co.*, 16 Ad. & El. 984, where the defendants were held liable for an injury suffered by an agent of the postoffice whom the postmaster-general required them to carry, ERLE, J., remarking, "The defendants have a public duty to perform in conveying the servants of the public safely."

So here. The company owe a duty to all public officers whose attendance there is made necessary by the business carried on at their wharf. It is too subtle a distinction to say that that though an invitation to the customs officer, whose duty it was to look after the landing of the coal which the steamer was about to discharge, might perhaps be implied, it cannot be to one whose presence was needful to prevent the frauds on the revenue, for which the arrival of any foreign going vessel, whatever her cargo, affords facilities. It avails nothing to say that the owners had not dedicated their wharf to smuggling and did not invite the plaintiff to come there to prevent it. They had dedicated their wharf to the use of vessels bringing merchandise from foreign ports, and without watchfulness on the part of the customs officers it was sure to be misused. The owners of places used for public entertainments do not dedicate them to pickpockets or mobs, but they none the less owe a duty to the policeman who attends when there is a

great crowd, to prevent violence and depredation. The instruction given by the presiding justice with respect to the circumstances which it was necessary for the jury to find in order to constitute an implied invitation to plaintiff, seems to have been carefully considered and affords the defendants no ground for complaint. It follows that the requested instruction was rightly refused. Under the motion to set aside the verdict as against evidence, defendants' counsel present with much force two points which always arise in cases of this description. 1. That defendants were guilty of no negligence in omitting to place a railing at the sides of the gangway into which the plaintiff fell, or a light to show where it was. 2. That plaintiff's injury was caused by his own negligence. We have given to the positions, taken in defense, the deliberate consideration which their importance merits.

We remark in the first place that both questions were for the jury and their conclusions are not to be set aside unless it is found that they were manifestly wrong.

1. Was it a defect to leave this gangway, cutting the direct passage along the wharf transversely and six or eight feet deep where the plaintiff fell, without a railing at its sides or a light at night, when a newly arrived ship was lying there?

Every thing which the defendants' counsel have said in support of their position that there was no negligence in so doing might be said with equal force in respect to the roll-way cutting transversely the platform in front of the defendants' block of stores in *Stratton v. Staples*, 59 Me. 94. The question is, did a reasonable regard for the safety of those whom the use to which the defendants had devoted their wharf might be expected to bring there require something in the way of safeguard at this gangway?

In principle the case is the same as all others (and they are numerous) arising from injuries received in unguarded elevators and other arrangements and contrivances for business purposes in business places. In *Indermaur v. Dames*, L. R., 2 C. P. 311, though the unfenced shaft through which the plaintiff fell on defendant's premises was constructed in the manner usual in the defendant's business, the defendant was not exonerated, as it appeared that the shaft could, when not in use, have been fenced without injury to the business.

The case is an instructive one as reported from the Exchequer Chamber, *ubi supra*, and also in the discussion upon the rule to set

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aside the verdict and grant a new trial in the Common Pleas, L. R., 1 C. P. 274. In fitting up a place for business purposes one is at liberty to consult his own convenience and profit, but not without a reasonable regard for the safety of those whom his operations bring upon his premises upon lawful business errands. In particular, every thing, which may operate as a trap or pitfall for those not familiar with the place or moving in a dim light, is to be avoided, if reasonable care will accomplish security to life and limb in that respect. Counsel ask in substance, why call upon the defendants to fence this gangway more than the sides or end of the wharf? It is a sufficient answer that a railing at the sides and end would even if movable, be likely to be an unreasonably troublesome obstruction to the business for which the wharf was prepared, and it would certainly be from its extent unreasonably expensive to maintain. Not so in either respect at the gangway.

Nor is there so great a liability to accident at the sides or end as there is in such a gangway, midway, where one's eye catches a sense of security from seeing in an uncertain light the bulk of the wharf and of the vessel lying beside it extending before him. Considering how easy it would have been by means of a single piece of railing fitted upon posts of proper height, movable like those at railroad crossings if desired, to guard against any such mischief as happened here, we think the jury did not err in saying that a reasonable regard for the safety of human beings required the defendants either to put it there or take some other means to warn a man, engaged as the plaintiff was, of danger at the gangway.

II. The question as to contributory negligence on the part of the plaintiff was a more doubtful one.

Defendants' counsel put the dilemma thus: "If the night is light enough to see the gangway, no railing or light is necessary to enable a person to avoid it, and if the night is too dark to allow of its being seen, then a person groping around in the dark and unconsciously walking into it is guilty of such negligence as to preclude him from recovering." But if this plausible statement is absolutely correct, there never can be an accident of this description for which the injured party can recover. The idea seems to be that there is no necessity for any precaution on the part of the wharf owners, because constant vigilance on the part of those who come there when it is light enough to see the danger will enable them to avoid it; and duty or no duty, they must not come without a light in

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the night time, or they will be set down as wanting in ordinary care and so forfeit their right to protection or compensation. The argument establishes, if any thing, too much. The questions are not of a character to be disposed of by a little neat logic. They are rather, as remarked by the court in *Elliott v. Pray*, 10 Allen, 384, "questions which can be best determined by practical men on a view of all the facts and circumstances bearing on the issue." No such sweeping syllogism as this presented by defendants' counsel can be adopted as a rule of decision. A man may be deceived by a half light, such as is described in the testimony here, and using due care himself, may meet with an accident by falling into a chasm where he was not bound to expect to find one unguarded, and in such case, if he is not a mere licensee or trespasser, and the owner of the premises owes him a duty, he is entitled to his remedy.

It is noticeable that in arguing this point on the motion, the learned counsel for defendants fall back in part upon their original contention that the customs officer "was obliged to move about at his own peril." Not so. His duty carried him there in consequence of and in connection with the business which defendants had established there. The jury probably thought that if he went as a section of a torchlight procession he might as well have stayed at home; that he was not in search of an honest man, and had no need of a lantern; that it would take a cordon of custom-house officers, exhibiting themselves with lanterns, numerous enough to surround the vessel constantly from the time she hauled into the wharf till she was unloaded, to prevent the mischief, while prudently conducted observation by one or two watching at the right times and seasons without making their presence known, would answer the same purpose. Seeing that the defendants did owe a duty to the public officer, and seeing, too, how easily they might, to all appearance, by a little precaution, have prevented his being made a cripple, if the "practical men" before whom the case was tried made allowances for the liability of the human senses to deception in a dim light, and acquitted him of a want of ordinary care in the premises, we are not satisfied that the conclusion they reached on this question of contributory negligence, is so plainly unjustifiable as to require us to send the case to a new trial.

No complaint is made as to the amount of damages.

Motion and exceptions overruled.

APPLETON, C. J., WALTON, VIRGIN, LIBBEY and SYMONDS, JJ., concurred.

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NOTE BY THE REPORTER.—In *Degan v. Dunlap*, Philadelphia Common Pleas, January, 1882 (Leg. Int., Jan. 27, 1882), it was held that wharves on navigable rivers are not the private property of him who erects them, and persons who go upon and fasten vessels to them are not trespassers. In this case, a schooner laden with melons was fastened to the end of defendant's wharf on the Delaware river, without his express permission, and a stevedore attempting to move the vessel into the dock was injured by the falling of a plank, fastened on top of the cap log, which was loose or rotten. Upon suit for damages against the owner of the wharf a nonsuit was granted, on the ground that plaintiff was a trespasser, but upon motion the nonsuit was taken off. The court said: "We think that the end of this wharf, being in the public highway, was a part of the highway to which a craft had as much right to attach itself as it had a right to cast anchor in the stream in front of the land of the riparian owner. The licensing the erection of a wharf to enable the owner to make a profit of this space is not an unlimited and unrestricted gift. Their main purpose is to secure and improve the commerce of the port. One therefore who secures a license to erect a wharf is bound to keep it in a condition to subserve the ordinary purposes of a wharf, and a person hitching his vessel temporarily to an unoccupied wharf is in the pursuance of his common-law right, and the owner is bound to keep it in reasonable and ordinary repair. The extension of a wharf into the public highway is an invitation to the public. In *City of Pittsburgh v. Grier*, 10 Harris. 64, Chief Justice BLACK uses this language: 'The city being in possession of the wharf, exercising an exclusive supervision over it, and receiving tolls for its use, is it a violation of the duty which the corporate authorities owe to the public to let it go out of repair? The affirmative of this was decided in an action on the case against the *Mayor and Burgesses of Lyme Regis*, 3 B. & Ad. 77, and by the Supreme Court of New York in several cases. 11 Wend. 543; 21 id. 115. The general rule undoubtedly is that those who have a public work under their control are bound to repair it; and the force of this is still further increased when it yields its possessor a revenue. The cases above cited show that this principle applies to public ports in possession of a city, as well as canals, bridges and other highways in the hands of individuals and private corporations. There is no reason nor authority for any distinction. The interests of commerce imperatively require that the place to which vessels are invited to come should be in a safe condition.' * * * The whole history therefore of the construction of wharves, and the common and statute laws which regulate their erection and use, all show clearly that they are not in the ordinary sense to be considered the private property of the person who erects them. A person therefore who goes upon them, or who fastens his vessel to them, does not by so doing make himself a trespasser." To the same effect, *Sherlock v. Bainbridge*, 41 Ind. 35; a. c., 13 Am. Rep. 302.

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(73 Me. 377.)

Trespass — wrongful attachment — damages — offer to return property.

In an action of trespass for wrongfully attaching and seizing goods, damages cannot be mitigated by proof of an offer to return the property in the same condition on the next day.

TRESPASS. The opinion states the case.

M. P. Frank and N. & H. B. Cleaves, for plaintiff.

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Strout & Holmes, for defendant.

PETERS, J. A deputy sheriff wrongfully attached the plaintiff's goods, dispossessing the plaintiff and putting a keeper in charge of his store. On the next day, the deputy tendered to the plaintiff a return of the goods uninjured, and in the same condition as when attached the day before. The plaintiff refused to receive them.

It was ruled at the trial that the damages for the attachment and taking should be limited to any injury necessarily sustained by the plaintiff, by the disturbance of his possession from the date of the attachment to the date of the offered return. This was error. The general rule of damages applies in such case. The plaintiff was entitled to recover what the entire property was worth when it was attached. A return of property in mitigation of damages could not be forced upon the owner against his consent.

When repossession and redelivery are spoken of, in the cases relied upon by the defendant, as going in mitigation of damages, it has reference to a return of the property with the consent of the owner. A person cannot be said to possess, who does not consent to the possession. Nor can there be a redelivery where there is no acceptance. A mere offer to deliver is not a delivery.

It has been held that an officer, liable as a trespasser for irregularly distraining goods for taxes, may be entitled to have the amount of the taxes deducted from the damages recoverable against him, the taxes being regarded as thus cancelled and paid. It is for the owner's benefit in such case that the tax be regarded as paid. And other cases founded upon the same or a similar principle may be found. But in all of them the doctrine is founded upon the idea, that the deduction or mitigation is allowed with the implied assent of the owner. The case at bar is not such a case.

The case most relied upon, to support the proposition advocated by the defendant, is *Delano v. Curtis*, 7 Allen, 470. But in that case a vital element was wanting which is not absent here. In that case, the defendant did not take the property into his own possession, or necessarily exclude the owner from its control. He merely forbade, but did not attempt to prevent, a removal of property which was upon his own premises. The facts are not very fully reported, but *Greenfield Bank v. Leavitt*, 17 Pick. 1 (28 Am. Dec. 268), is cited in the opinion as its authority, and the latter case decides only, that "if the property for which the action is brought, should be

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returned to and received by the plaintiff, it shall go in mitigation of damages." In *Stickney v. Allen*, 10 Gray, 352, the same court refused to apply the doctrine, which the present defendant contends for, to a state of facts calling for its application, if in any case it should be applied, the property taken being certain stereotype plates of peculiar value to the plaintiff, and of very little value to anybody else. But as PUTNAM, J., said, in *Greenfield Bank v. Leavitt*, *supra*, "the certainty of a rule is quite an equivalent for its occasional want of perfect exactness."

The rule asked for by the defendant would give to the trespasser more power and discretion than courts are accustomed to exercise which order an acceptance of property offered to be returned in mitigation of damages, after a hearing as to its justice and expediency. In such case, by the power of the courts, an owner may have to accept a return of his property; but by the power of the party he must accept it, if the defendant's theory prevails.

It is true, that such a rule would work well in a few peculiar and exceptional cases. The trouble is, that it would operate unjustly in very many and most cases. A dividing line could not be easily established. The rule would have to apply to all cases where the trespass is not willful, wanton or malicious. This would give the election to a trespasser to decide how an owner shall be compensated for his trespasses. It would have a tendency to stimulate carelessness and unwarranted experiments in attaching property. It would impose unusual and unreasonable risks and responsibilities upon the owner. He may lose his credit, or be broken up in his business, by an improvident trespasser, and still be obliged to accept his goods again. He may in the meantime have got other goods, or gone into other business, and not be favorably situated to take the property back. He must at his peril decide correctly whether the trespass was a wanton or malicious act or not. How is he to ascertain that fact? How may he know whether the property will be returned or not? How long shall he be held in suspense by the wrong-doer? How can he always know whether the property is returned in the same condition as when taken or not? In most cases, his embarrassments would be greater than he could bear. The law does not impose them upon him.

Exceptions sustained.

APPLETON, C. J., WALTON, DANFORTH and LIBBEY, JJ., concurred.

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CARPENTER V. GRAND TRUNK RAILWAY COMPANY.

(72 Me. 388.)

Statute — extra territorial force — presumption.

A statute of Maine, enacting that the holder of a railway ticket shall have the right to stop over and that the ticket shall be good for six years, has no extra-territorial force.

The law of other States will be presumed to be the common law.*

CASE for ejection from railway car. The opinion states the case. The plaintiff had judgment below.

Geo. A. Wilson, for plaintiff.

J. & E. M. Rand, for defendant.

WALTON, J. The plaintiff claims to recover damages for having been, as he says, wrongfully ejected from the defendants' cars. The facts, briefly stated, are these :

The plaintiff purchased a ticket of the Grand Trunk Railway Company, of Canada, entitling him to a passage from Portland to Montreal. The ticket had these words printed upon it: "Good only for continuous trip within two days from date." The ticket was dated March 3, 1875. It was purchased at the company's office in Portland. The plaintiff started on his journey, and having stopped over at various places along the route, reached Coatacook in Canada several days before March 30, 1875. On that day he took the train for Montreal, but the conductor refused to allow him to ride on the ticket of March 3, 1875, and forcibly ejected him from the cars. For this act he commenced an action against the company in this State, and has obtained a verdict for \$200 damages. The defendants claim a new trial upon the ground that the rulings of the presiding judge were erroneous.

A statute of this State (Act 1871, ch. 223) declares that the holder of a railroad ticket shall have the right to stop over at any of the stations along the line of the road, and that his ticket shall be good for a passage for six years from the time it is first used. The presiding judge ruled that if the plaintiff was put off the train for no other rea-

* See *Ormes v. Dauchy* (82 N. Y. 443), 37 Am. Rep. 583, and note, 584.

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son than because he was travelling on the 30th March on a ticket dated on the 3d of the same month (there being no evidence in the case of any local law or statute of Canada in conflict with the law of Maine), the defendants would be liable. The question is whether this ruling can be sustained. We think it cannot. The act of 1871 applies only to transportation within the territorial limits of this State, and cannot be applied to an entire passage from Portland to Montreal. To hold otherwise would render the act unconstitutional. *Hall v. De Cuir*, 95 U. S. 485. In that case the courts of Louisiana had construed a statute of that State, intended to secure equality of rights to colored passengers, as applicable to the entire voyage of a steamboat carrying passengers from New Orleans, in the State of Louisiana, to Vicksburg, in the State of Mississippi; and because of this construction, which gave an extra-territorial force to the statute, the Federal Supreme Court held the act unconstitutional, as an attempt to regulate inter-State commerce, in violation of that article of the Federal Constitution which confers that power upon Congress. There is nothing in the decision to indicate that the constitutionality of the act would not have been sustained, if the State courts had held that it applied only to transportation within the State of Louisiana. It is clear therefore that we cannot give our statute extra-territorial force without rendering it unconstitutional, unless there is a distinction between a voyage by water upon the Mississippi river, and a passage by land over the Grand Trunk railroad; and it is the opinion of the court that no such distinction can be maintained.

This brings us to the inquiry whether the ruling at the trial can be sustained upon the ground that there was no evidence of what the law of Canada was. We think not. Undoubtedly the case was to be tried in accordance with the law of this State, in the absence of proof of any other law. "It is a well-settled rule," say the Court of Appeals of New York, "founded on reason and authority, that the *lex fori*, or in other words, the laws of the country to whose courts a party appeals for redress, furnish in all cases, *prima facie*, the rule of decision; and if either party wants the benefit of a different rule or law (as for instance, the *lex domicilii*, *lex loci contractus*, or *lex loci rei sitæ*), he must aver and prove it; the courts of a country are presumed to be acquainted with their own laws, but those of other countries are to be averred and proved, like other facts of which courts do not take judicial notice." *Monroe v.*

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Douglass, 5 N. Y. 447. And the rule is similarly stated in a recent English case: "A party who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the court, and to establish it in proof; otherwise the court (not being entitled to notice such law without judicial proof), must proceed according to the law of England." *Lloyd v. Guibert*, L. R., 1 Q. B. 115-129. It is often said that in the absence of proof to the contrary the court will presume the foreign law to be the same as the domestic law. But we think the above is the better way of stating the rule. The result is the same.

The judge who presided at the trial was therefore right in the assumption that the law of Maine was to furnish the rule of decision, the law of Canada not having been proved; but we think he was wrong in the assumption that it must be the statute of 1871 instead of the common law of the State. Holding, as we do, that the statute of 1871 is applicable only to transportation within the State — that it abrogates the common law only to that extent — we think a contract for the sale of a ticket may lawfully be made here, and may lawfully place a limitation upon the time within which it shall be used, other than that stated in the statute, if it is to be used in some other State or country; and that such limitation will be *prima facie* binding upon the purchaser; and that he can only avoid the *prima facie* effect of such limitation by showing that the law of the place where it was to be used did not permit it. In other words, we hold that the common law is still in force here with respect to such contracts; that is with respect to contracts or tickets for transportation in other States or countries. For instance, the plaintiff's ticket entitled him to a passage from Portland to Montreal. It had this limitation printed upon it: "Good only for continuous trip within two days from date." While using it within this State the limitation would be inoperative by force of the statute of 1871. Within this State he could stop over and resume his journey at any time within six years. But while using it in New Hampshire, Vermont or Canada, the limitation would be *prima facie* valid; and he could only avoid this *prima facie* presumption by showing that by the law of these places the limitation was not valid. The burden of proof to show the existence of such a law would be upon him, not upon the railroad company to show its non-existence. The fact however should not be overlooked that by availing himself of his right to stop over in this State, the holder of such a ticket would

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break the continuity of his journey, and thus perhaps forfeit his right to ride further upon it when he should reach the line of the State. But that is a matter to be thought of when purchasing or accepting such a ticket.

By what law a carrier's contract is to be governed when it stipulates for transportation of freight or passengers through more than one State or country, and the laws of these States or countries are not the same, is a problem not easily solved. The authorities are confused and conflicting. The more recent decisions will be found cited and commented upon in the second edition of Wharton's Conflict of Laws, §§ 471-481, inclusive. We do not find it necessary to discuss the question, because at the trial of this cause no such conflict was shown to exist, and the question is not properly before us.

Exceptions sustained. New trial granted.

APPLETON, C. J., BARROWS, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

MCLELLAN v. HAYFORD.

(73 Me. 410.)

Attorney and client — retainers — custom.

There is no custom in Maine to charge retaining fees in contested cases so general as to warrant a recovery therefor over and above ordinary charges covering all services rendered.

ASSUMPSIT on account and for work and money paid out. The opinion states the point. The plaintiff had judgment below.

Folger & McLellan, for plaintiff.

J. W. Knowlton, for defendant.

BARROWS, J. The question briefly stated is whether in an action by a counsellor at law against a client, on an account annexed for services and disbursements in a number of suits, embracing specific charges for all the services rendered and expenses incurred in minute detail, it is proper for the presiding justice, without proof of any agreement to pay any retainer fees (except in a single case where

one of \$50 was paid in advance), and without proof of any custom or usage among lawyers to charge a retainer fee to their clients, to instruct the jury that "in contested cases and for reasonable amounts such fees were a legal charge, and that the plaintiff should recover a reasonable sum for retainer fees in each account," leaving it to the jury to say whether the charges were reasonable or not.

The jury must have understood from this that proof of the employment of the plaintiff as counsel would of itself, as matter of law, raise an implied promise on the part of the defendant to pay any reasonable sum which the plaintiff might charge as a retaining fee in all the contested cases, besides making compensation for all the services actually rendered; that something was due and recoverable as and for a retaining fee in addition to the pay for services and disbursements in each contested case, and that the only question for them was, whether the sum charged was a reasonable sum to charge for a retainer. In support of the instructions the plaintiff relies upon the cases of *Aldrich v. Brown*, 103 Mass. 527; *Perry v. Lord*, 111 id. 504; *Pierce v. Parker*, 121 id. 403, and *Eggleston v. Boardman*, 37 Mich. 14.

But neither of these cases, nor all of them combined, can be regarded as authority for the instruction here complained of. So far as they have any bearing on the question the propositions which they respectively sustain are these:

In *Aldrich v. Brown* it is held that no special contract is necessary to entitle an attorney actually retained in a suit to charge a reasonable retainer. Doubtless in proper cases such a contract may be implied.

Perry v. Lord is a good brief illustration of the special operation of a retainer, and of the circumstances under which a contract to pay one may properly be implied. The counsellor, though consulted and engaged to assist throughout the case, was not again called upon and had no further claim for services in the matter.

Pierce v. Parker only holds that where an attorney performs other services besides those which are made the subject of specific charges, he is entitled to compensation therefor by a charge for commissions on the money collected, "or in some other general form," though the money may not have actually gone through his hands.

Eggleston v. Boardman simply affirms the doctrine declared in *Aldrich v. Brown*, with the additional remark that "retainers are

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uniformly and universally charged, and may be recovered under the common counts. The remark is doubtless true as touching the usage in Michigan. But we know of no such universal practice in this State, and the exceptions before us at all events show that no evidence of any such usage was presented at this trial. Nor do we find that the instruction can be better maintained upon principle than by authority.

The circumstances under which a contract to pay a counsellor at law for services rendered and expenses incurred may be inferred, and the character and effect of that contract, do not essentially differ from those which pertain to and regulate contracts of other professional services, skilled labor of any kind, and in fact any kind of service in which the amount of the compensation necessarily depends largely upon the circumstances under which the service is rendered, its nature, and the charges that are usual and customary for like services.

Hence in the absence of a special contract to pay these retainers the plaintiff must prove enough to show that there was an implied promise on the part of the defendant to pay them. The proper scope and application of the right to charge retainers is to remunerate counsel for being deprived, by being retained for one party, of the opportunity of rendering services for and receiving pay from the other—not to swell the amount of the bill which accrues for services rendered throughout the progress of the cause and contains specific charges for them all. The necessity, force and effect of proof of a particular usage have been so fully discussed in *Bodfish v. Fox*, 23 Me. 90; *Codman v. Armstrong*, 28 id. 91; and *Leach v. Perkins*, 17 id. 462, that they need no further elucidation here.

Referring to these cases for the rules and principles involved we say that there is no general custom in this State amounting to a rule of law, to be declared by the court, which would authorize the presiding judge to pronounce the plaintiff entitled to recover these retainers from the mere fact that he was employed by the defendant to render services in the cases.

In the absence of any evidence tending to establish the existence of a particular usage with reference to which these parties may be presumed under the circumstances to have made their contract, the instruction that such fees were a legal charge, and the plaintiff was entitled to recover a reasonable amount for retainer fees in each account was not correct.

Moreover had there been proof of a usage to charge retainer fees in addition to liberal specific charges for all services rendered and all expenses incurred, in cases where the counsellor was not merely retained, but was actually employed in the case throughout, we think it would have been the duty of the presiding judge to declare such a usage to be against natural reason and justice and not binding upon the defendant.

An examination of the account presented by the plaintiff shows that besides specific charges for services (some of which might well be regarded as included in the liberal and punctual charges of term fees in the cases he was engaged in), the plaintiff charged his client with even the minutest items of his personal expenses in attending to the business, such as sixpences for fares in the horse cars and the like. Such exactness leaves neither occasion nor room for the charges "in some other general form" (like that of retainer fees) spoken of in *Pierce v. Parker*, 121 Mass. 403, as designed to cover other services performed by the counsel besides those which are made the subject of specific charge. It is suggested at the bar that plaintiff is willing to cure the error by a *remittitur*. If he remits an amount equal to all the sums which stand charged in his account for unpaid retainers, there will be no occasion to send the case to a new trial. The only error alleged will then have become harmless, and the exceptions may be overruled.

Unless he so remits within a reasonable time,

Exceptions sustained.

APPLETON, C. J., WALTON, DANFORTH, PETERS and LIBBEY, JJ., concurred.

SYMONDS, J., dissented.

MILLER V. HATCH.

(72 Me. 481).

Surety — executory agreement to compromise with principal.

An agreement by a creditor to accept a certain percentage within a specified time, in full of his claim, but containing no stipulation for delay or extension, and never complied with, does not discharge a surety for the debt.

ACTION on promissory note. The opinion states the case. The plaintiff had judgment below.

Miller v. Hatch.

G. T. Stevens, for plaintiff.

J. W. Spaulding, W. T. Haines and F. J. Baker, for defendant.

APPLETON, C. J. This is an action for assumpsit on two promissory notes, dated September 15, 1871, signed by Farr, Hatch & Co. The defendant, Henry Hatch, was a member of that firm at the time the notes were given.

April 18, 1872, Hatch sold out his interest in the firm to Jerome L. Farr, for \$5,000. On August 3, 1872, notice was given in the papers of the dissolution of the firm of Farr, Hatch & Co., and that it was succeeded by the firm of Warren A. Farr & Co., which assumed the liabilities of the firm of Farr, Hatch & Co.

In December, 1872, the firm of Warren A. Farr & Co. became insolvent. The defense rests on the ground that after the dissolution of the firm of Farr, Hatch & Co. they stood in the relation of sureties on the note, and they were discharged by reason of the plaintiff's signing with others an agreement under seal in these words:

"We, the undersigned, creditors of Warren A. Farr & Co., of Boston, in the Commonwealth of Massachusetts, in consideration of one dollar and other good and sufficient considerations to us severally paid by said Warren A. Farr & Co., the receipt of which is hereby acknowledged, do severally promise and agree with the said Warren A. Farr & Co., that we receive in full satisfaction and discharge of our respective claims against them, the amount of sixty per cent thereof in the following manner, namely: Twenty-five per cent of said claims, respectively, in thirty days from the date hereof, and the remainder in sixty days from the same date of this instrument.

"Witness our hands and seals severally adopting the seal set opposite the first signature as the seal of each of us respectively, this thirty-first day of December. A. D. 1872.

"M. E. MILLER. [Seal]."

This was signed by over forty creditors of the firm. Nothing was paid the plaintiff under this contract.

The jury found specially that the plaintiff had no knowledge of the assumption of the liabilities of the firm of Farr, Hatch & Co. by that of Warren A. Farr & Co. Much of the argument of the learned counsel for the defendant is devoted to proving that this find-

ing was erroneous. In the view we take of the case it is immaterial whether she knew of such assumption or not, inasmuch as she has done nothing to injuriously affect the rights of Farr, Hatch & Co.

Conceding, for the purpose of argument, that after the dissolution of the firm of Farr, Hatch & Co., the firm were to be regarded as sureties, the plaintiff, by her signature to the contract of December 31, 1872, has done nothing to discharge their liability. This was only an offer on condition. It was not accepted or performed by the firm to which it was made. The plaintiff gave no delay. She might have sued at any time. The contract was no present discharge of the plaintiff's rights. It was no bar to an instantaneous suit, had she brought one. The agreement was purely executory. It was never executed. Nothing was ever paid. The only provision for a future discharge was upon the payment of the sum stipulated. Until that condition should be performed, the plaintiff's debt remains unaffected by the executory agreement for a discharge.

The authorities are in entire accord with this view of the case. In *Clifton v. Litchfield*, 106 Mass. 34, it was held that an executory contract, by way of compromise, to discharge a disputed, unliquidated claim, by the giving of the debtor's promissory note, for a sum less than the amount actually due, is not a bar to a suit upon the original demand, although the note has been tendered the creditor, if it has not been accepted. In *Blake v. Blake*, 110 Mass. 202, the agreement was under seal. "The agreement," observes WELLS, J., "to accept a part in satisfaction of the whole, so long as it remains executory, will not operate either as payment, satisfaction or discharge." In *Cushing v. Wyman*, 44 Me. 121, the question here presented was fully examined and considered, and it was then held that an executory agreement constituted no bar to a suit.

Upon some of the facts contested in the motion for a new trial, there is conflicting evidence, but there is no such preponderance as would justify or require our interference.

Motion overruled. Judgment on the verdict.

WALTON, BARROWS, DANFORTH, PETERS and LIBBEY, JJ., concurred.

Simpson v. Welcome.

SIMPSON V. WELCOME.

(72 Me. 406.)

Will — trust for charity — “religious.”

A trust provision in a will for “the purchase and distribution of such religious books or reading as they shall deem best,” is for a public charity, and not void for uncertainty.*

“Religious” means “Christian.”

A PPEAL from probate decree. The opinion states the case.

A. P. Gould, for appellants.

Byron D. Newill, for executors.

DANFORTH, J. The question involved in this case is the construction of the fourth item in the will of the late Ralph Harley, or the validity of the gift contained therein. The item so far as material is as follows: “I hereby give, devise and bequeath in trust to I. C. Welcome, of Yarmouth, and Franklin L. Carney, of Newcastle, all that may remain both of my real and personal estate, * * * and further direct the said Welcome and Carney to expend all that may remain * * * in the purchase and distribution of such religious books or reading as they shall deem best, and as fast as the funds shall come into their hands.”

The objection made is that the direction as to the appropriation of the fund is too vague and indefinite to be sustained.

The meaning of the testator is not obscure or open to doubt. That the fund is given in trust, that the whole of it is to be expended in religious books or reading, that all the books or reading so purchased are to be distributed, and that the class of persons to whom distribution is to be made is limited only by the discretion of the trustees, are all so clearly within the meaning of the testator, as expressed in his will, as not to admit of doubt. But it is claimed that vagueness and uncertainty attaches both to the character of the

* See *Rhymer's Appeal*, post, and note.

books to be distributed and the persons or class who are the beneficiaries under the gift.

The word "religious" is the only expression descriptive of the character of the books to be bought and distributed, and describes such as teach or inculcate religion. It is true that religion in its broadest sense may include all the different systems of faith and worship which can be found in the world. In this sense it may be conceded that the trust is one which neither law nor equity would sustain. In the great variety of religions prevailing, and so great the conflict between them, if all were to be included, the intention of the testator could not be executed, if one, or more, his intention could not be ascertained. But happily we are not reduced to this dilemma. Words used in a will, as in other instruments, are construed in connection with the words in whose company they are found, as well as in the light of the circumstances in and under which they are used.

In this case the testator had his domicile, and made his will in a country, where though there is no religion established by law, there is one general system which is universally recognized as embodying the true faith, and whatever difference there may be in the detail, as to belief or form of worship, all the different denominations are equally entitled to the protection of and are equally recognized by the law. Under these circumstances when religious books or reading are spoken of, those which tend to promote the religion taught by the christian dispensation must be considered as referred to, unless the meaning is so limited by associate words or circumstances as to show that the speaker or writer had reference to some other mode of worship. There is no such limitation in this case. Whether this testator, or his trustees were or are believers in any form of religion which may *ex cathedra* be pronounced superstitious or erroneous, does not appear. Nor can we assume such to be the fact from the absence of any evidence upon that point. The inference is the other way, and we must conclude that the meaning to be attached to the word "religious," as used in the will, is the same as that which is usually given to it in the community under like circumstances. If susceptible of two or more meanings, the better, that which is more consonant with the policy of the law and productive of the welfare of society, is to be taken rather than the other.

It is true that no beneficiaries are specifically named. If this is a public charity it is not necessary that any should be. The per-

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sons to be reached are left to the discretion of the trustees, and are otherwise unlimited in numbers or class. The object to be accomplished may be considered the general welfare of the community, or if circumstances permit, even that of mankind. In either view it may be sustained, as in the case of the gift for the Smithsonian Institution, at Washington, "for the increase of knowledge among men," approved by the courts of England, and in *Whicker v. Hume*, 14 Beav. 509; s. c., 7 H. L. C. 124, in which the trustees were to apply the fund given in "their absolute and uncontrolled discretion, for the benefit and advancement, and propagation of education and learning in every part of the world, so far as the circumstances will permit." This case is in the principles involved similar to and decisive of the one at bar. It is not material that the names or number of persons to be benefited should be given if the purpose to be accomplished is made certain. The very idea of a public charity is that the benefit is to be generally bestowed. *Going v. Emery*, 16 Pick. 107 (26 Am. Dec. 645)

That this legacy must be considered legally as intended for a public charity would seem to be well settled by the authorities in England and in this country. True, it is not so named in the will, nor does it come within the terms of the Stat. 43 Eliz., c. 4, which is descriptive of public charities, and has been adopted as part of the common law here. *Going v. Emery, supra*. It is sufficient if the terms used bring it within the description of a charity, and within the spirit of the statute referred to. 2 Story Eq. Jur., §§ 1155-1164. Lord CAMDEN, in *Jones v. Williams*, Amb. 651, defines a charity as "a gift to a general public use, which extends to the poor as well as the rich." After a full review of the authorities, GRAY, J., in *Jackson v. Phillips*, 14 Allen, 556, defines a charity, in the legal sense, "as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion," etc. These definitions so far as we have been able to ascertain, are fully sustained by the cases, and fully cover the legacy in this case. See also, 2 Red. on Wills, § 71, and cases cited; *Drew v. Wakefield*, 54 Me. 291; *Everett v. Carr*, 59 id. 325; *Bartlett v. King*, 12 Mass. 537 (7 Am. Dec. 99).

In view of these authorities we may well adopt the language of SHAW, C. J., in *Going v. Emery*, 16 Pick. 119, as particularly applicable to this case. "The donees are particularly designated,

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the trust is clear, the general objects sufficiently indicated to bind the consciences of the trustees, and to render them liable in equity to account for the execution of this trust, by a suit to be instituted in the name of the attorney-general, representing the public ; and that these objects are sufficiently certain and definite, to be carried into effect, according to the established principles of law and equity, governing donations to charitable uses."

Decree of Probate Court affirmed.

APPLETON, C. J., WALTON, BARROWS, VIRGIN and SYMONDS, JJ., concurred.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

OWINGS V. BAKER.

(54 Md. 82.)

Negotiable instrument — evidence — to restrict liability of indorser before utterance.

One who indorses a negotiable note before the payee may avoid his apparent liability as joint promisor, by proof of a different understanding of all the parties, but not otherwise.*

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

D. G. McIntosh, for appellant.

William S. Keech, for appellee.

MILLER, J. The appellee is sued by the appellant as joint maker, with Rowland R. Hayward, of the following promissory note :

*To same effect, *Taylor v. French*, 2 Lea. 257; s. c., 31 Am. Rep. 639; *Keating v. Van Sickle*, ante, 101; and see *Stack v. Beach*, ante, 113.

“\$200.00.

BALTIMORE COUNTY, *February 16th*, 1876.

“Six months after date I promise to pay to the order of David Owings the sum of two hundred dollars at ——— with interest.

“ROWLAND R. HAYWARD.”

This note was indorsed in blank by Prudence S. O. Baker, the appellee, and the effort of the appellant, Owing, the payee in the note, is to hold her to the obligation of a joint maker or original promisor. The case was tried before the court without the intervention of a jury. There was no exception to the admissibility of evidence, and with the findings of the court upon questions of fact we have nothing to do. Our duty is simply to review the single question of law presented by the rulings rejecting the two instructions asked by the plaintiff, and granting the one asked by the defendant. The prayers of the plaintiff assert, in effect, the proposition that upon the finding of certain facts therein stated, the law fastened the responsibility of a joint maker upon the defendant. On the other hand the defendant's prayer presents substantially the proposition, that if the court found from the evidence in the cause, that it was the understanding and agreement of all the parties to the note when Mrs. Baker put her name upon the back of it, that she should occupy the position and be held to the liability of indorser, then her promise and undertaking was not an original, but a collateral one, and she is not responsible as joint maker. If this instruction be correct, it follows of necessity there was no error in the rejection of the plaintiff's prayers; and that it is correct there would seem to be no doubt in view of the decision of this court in the case of *Ives v. Bosley*, 35 Md. 262; s. c., 6 Am. Rep. 411.

In that case the court say the facts stated established by conclusion of law the responsibility of Ives as a joint maker or original promisor, but they further distinctly admit and decide, that the contract entered into by a blank indorsement will receive such a construction as will give effect to the intention of the parties, and that parol evidence will be admitted to show and explain what liabilities were intended to be assumed at the time of the transaction. The doctrine expressly announced in that case is, that if the contract set up is different from that which attaches by presumption of law, it must be established by proof showing that both parties, promisor and promisee, so intended and agreed, and that

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a third party who places his name on the back of a note before it is indorsed by the payee, can avoid the liability of a joint promisor, which the law in absence of proof to the contrary attaches to such an indorsement, by proving a different understanding of all the parties at the time of the transaction. An agreement to such effect between the drawer and a blank indorser alone without the assent of the payee will not do because that would open the door to fraud upon the creditor who may have taken the note in the utmost good faith, relying upon the blank indorsement as security for his debt. But where he assents and concurs in the agreement no such result can follow. In such a case both reason and justice require that the intention of the parties should be carried into effect, and that the indorser should not be held to a liability or made to assume a position he never contemplated, and which the party to whom the promise was made agreed he should not be placed in. Now this, as we understand it, is the legal proposition asserted by the defendant's prayer, and so interpreted it is in perfect accord with and sustained by the decision in *Ives v. Bosley*. It follows there was no error in the rulings excepted to and the judgment must be affirmed.

Judgment affirmed.

SMITH V. EASTON.

(34 Md. 188.)

Contract — to indorse — evidence — telegram — guaranty — consideration.

An action lies for breach of a promise, made upon consideration, to indorse a note.

A copy of a telegram, received at the office of its destination, is not the best evidence, and is only receivable on proof of loss of the original left at the transmitting office, and that it is a correct copy of such original (See note, p. 359.)

A promise to guarantee a debt already due, made in consideration of the forbearance of the creditor to attach the debtor's goods, is void where there was no valid ground of attachment.

ACTION for breach of promise to indorse a note. The opinion states the facts. The defendant had judgment below.

A. C. Trippe, for appellants.

John M. Carter, for appellee.

BRENT, J. There can be no question since the decision in this court, of the case of *Franklin Bank of Baltimore v. Lynch*, 52 Md. 270 ; s. c., 36 Am. Rep. 375, of the right of the appellants to recover under the form of their declaration. The appellee is not sued as an indorser, but the action is brought upon the breach of an alleged promise to indorse.

Two questions arise in the case. The first is the sufficiency of the evidence to establish the promise. The appellants, merchants in the city of Baltimore, having a claim upon open account against William H. Easton, a merchant in Chesapeake City, Cecil county, Maryland, sent their travelling agent and salesman to see Easton, and obtain from him a settlement. He went to Chesapeake City and saw Easton, but was not successful in getting the debt paid. The agent threatened to procure an attachment against the stock of goods in the store, when it was finally agreed that Easton should go over to the telegraph office, near by, and telegraph to his brother in New York, and "hear from him first." They accordingly went to the telegraph office, when the following dispatch was sent to James T. Easton, the appellee :

"CHESAPEAKE CITY, MARYLAND,
"February 16, 1875.

"To James T. Easton, 2 Coenties Slip, New York.

"Smith & Whiting are here, and will attach the stock, unless something is done immediately to secure them.

"WILLIAM H. EASTON."

On the same day, the following telegram, which was admitted in evidence subject to exceptions, was received at Chesapeake City :

"NEW YORK, February 16, 1875.

"To W. H. Easton, Chesapeake City, Maryland.

"Will indorse your Smith & Whiting note — three months. Best I can do."

"J. T. EASTON."

The agent of Smith & Whiting then took the promissory note of Wm. H. Easton at ninety days for five hundred and thirty-one dollars and fifty-eight cents, payable at the First National Bank of Elkton, Maryland, and upon his return to Baltimore delivered it to

his principals. They inclosed it to James T. Easton, New York, for his indorsement, but he refused to indorse it, and returned it to the appellants under cover of a letter, dated New York, April 3, 1875.

The question raised is the admissibility in evidence of the dispatch purporting to come from New York, and offered for the purpose of binding the appellee as promisor to indorse.

The appellants proved under a commission to New York city, on April 5, 1878, that all the messages sent from, and receipts for messages delivered from the office in that city, on February 16, 1875, had been destroyed.

The message, if any, sent by James T. Easton to that office to be transmitted to Chesapeake City, was the original (Scott & Jarnagin Law of Tel., § 357, and authorities there cited), and not the message which was received over the wires at Chesapeake City. The latter must be considered as a copy (id. § 361), and carries with it none of the qualities of primary evidence. Ordinarily the usual course is to show the delivery of the original message of the party, sought to be charged, at the office from which it is to be telegraphed, and then to show that it was transmitted and delivered at the place of its destination. But even where the original is produced its authenticity must be established. And this either by proof of the handwriting, or by other proof establishing its genuineness. The destruction of all the messages sent from the office, on the day named, is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon proof that the copy offered is a correct transcript of a message actually authorized by the party sought to be affected by its contents.

In *Howley v. Whipple*, 48 N. H. 487, a message was sent by telegraph to Montreal, and an answer was very soon received, purporting to come from the party to whom the message was addressed, and to be sent from Montreal. The court refused to admit it, without proof that it was in fact sent by the proper party. It was contended in this case, that the rule, which permits a letter to be admitted as evidence against a party, when there is no proof of the hand-writing, except the fact that in due course it had been received in reply to a letter which had been addressed to the same party, should be applied to telegraphic dispatches. While it was thought it might apply to a dispatch in answer to a communication by letter, it was held to be inapplicable to a dispatch received in

reply to a communication sent by telegraph. And this seems to be now the recognized law where both the message sent and the answer are by telegraph.

In the case of *United States v. Babcock*, 3 Dill. 576, the court refused to allow a telegraphic dispatch to be offered in evidence without proof of the handwriting of the defendant, or that it was authorized, or sent by him or by his direction. And this we take to be the unquestioned rule.

The evidence in this case clearly establishes the message sent from Chesapeake City to New York, and that a message was sent from New York on the same day purporting to be in answer. But the proof wholly fails to connect the appellee with the latter, or to show that it was sent by him, or by his authority or direction.

The letters which have been offered in evidence throw no light upon this question, indicating that the message sent was either received, or answered by the appellee. Neither the letter of the appellants, nor those of the appellee, are found to contain a single allusion to any promise by telegraph to indorse the note, or to any telegraphic dispatch whatever.

The other question which has been presented is the liability of the appellee upon the promise to indorse, assuming that the telegraphic dispatches are sufficiently proved to be submitted to the consideration of the jury. Although there has been some discussion in the cases as to whether the dispatch sent to the office to be transmitted, or the dispatch transmitted and received at its destination is the original, they all agree that a telegraphic dispatch is a sufficient compliance with the statute of frauds in its requirement that a promise, like that alleged in this case, should be in writing. This point was not controverted in the argument, and we shall pass it without further remark, as having been conceded by both sides.

The alleged promise of the appellee was to guarantee the debt of another already due by indorsing his promissory note. Such a guarantee, to carry with it a liability to the payee, is not only required to be in writing but it must also be supported by a consideration. The consideration in this case is the forbearance of the appellants to sue out process of attachment against the stock of goods of their debtor, then in the store at Chesapeake City.

In *Ecker v. Bohn*, 45 Md. 278, this court held that although forbearance to proceed in bankruptcy against a debtor constituted a good consideration for the promise of another to pay the debt, yet

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if the creditor had in fact no right to take such proceedings against his debtor, the consideration failed, and no action accrued upon the promise or undertaking. In this case the proof very clearly shows that there was no ground for the process of attachment against Wm. H. Easton. The appellants and he were residents of the State, and in that case an attachment would lie only for some one or more of the causes assigned in the act of 1864, ch. 306. The agent states that he was prepared to make an affidavit that Easton was fraudulently disposing of his goods. Upon his cross-examination it appears that the only disposition of the goods he knew of or alluded to was the sale of them in the usual mode of merchants, to customers who came to the store to buy. The goods were in the store for that purpose, and such a disposition of them no court would hold to be fraudulent. The facts are not sufficient to support an attachment against a resident. Upon motion the defendant would be entitled to an order quashing the writ.

As the appellants, upon the proof in the record, had no legal right to attach, there was an utter failure of consideration, under the authority of the case just cited from 45 Md., for the promise of the appellee, even if such promise had been established by proof legally sufficient to be submitted to the jury.

The law in our opinion being against the right of the appellants to recover, we think the rulings of the court upon the prayers presented were without error, and the judgment will be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Whilden v. Merchants and Planters' National Bank*, 64 Ala. 1; s. C., 38 Am. Rep. 1, and note, 5.

In *Saveland v. Green*, 20 Wis. 431, it was held that the party who sends an order by telegraph makes the telegraph company his agent for its transmission and delivery, and is bound by the message *as delivered*; and where legal rights of the receiver, founded upon such order are in question, he is entitled to put in evidence the message actually received as the original. The court said:

"In a late treatise on the subject (Scott & Jarnagin on the Law of Telegraphs), it is said that 'telegraph messages are instruments of evidence for various purposes and are governed by the same general rules which are applied to other writings' (§ 340.) Also, that 'the original message, whatever it may be, must be produced, it being the best evidence; and in case of its loss, or inability to produce it from other cause, the next best evidence the nature of the case will admit of must be furnished. If there is a copy of the message existing it should be produced'; if not, then the contents of the message should be shown by parol testimony.' (§ 341.) We believe the above extracts contain a correct statement of the law, and so hold.

"It only remains to determine which was the original message, that delivered to the telegraph company by Bohne at Buffalo, or that received by the plaintiff from the telegraph office in Milwaukee.

"Discussing a similar question in *Durkee v. Vt. C. R. R. Co.*, 29 Vt. 127, REDFIELD, Ch. J., stated the law as follows: 'In regard to the particular end of the line where inquiry

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is first to be made for the original, it depends upon which party is responsible for its transmission across the line, or in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case inquiry should first be made for the very despatch delivered. In default of that, its contents may be shown by the next best proof' (p. 140). To the same effect are *Trevor v. Wood*, 36 N. Y. 807 and *Dunning v. Roberts*, 35 Barb. 463. In *Howley v. Whipple*, 48 N. H. 487, it was sought to prove that a person was in Montreal on a given day by showing that a telegram, purporting to have been sent by him from that place on that day, was received at a town in New Hampshire. It was held that the message received did not prove the fact that the supposed sender thereof was then in Montreal. The decision was doubtless correct. But the court in that case recognized the correctness of the rule laid down in the cases above cited.

"*Matteson v. Noyes*, 25 Ill. 591; *Kinghorne v. Montreal Telegraph Co.*, 18 Up. Can. (Q. B.) 60, and *Williams v. Brickell*, 37 Miss. 682, are cited by counsel for defendant as authorities for the opposite doctrine. In *Matteson v. Noyes*, the telegram purported to have been sent by the appellee to a witness, and was offered in evidence by the appellant and admitted. Its contents or purport is not given in the report of the case, nor are we informed of the purpose for which it was offered. It does not appear that its admission in the court below had any influence on the decision of the case by the Appellate Court. For these reasons the case as reported is valueless as authority. *Kinghorne v. Montreal Tel. Co.* was an action against the company for failure to deliver a message, and hence is not in point. It is quite true however that we find language in the opinions in both the above cases which go far to sustain the views of counsel for the defendant; yet the cases cannot properly be regarded as authority in a case like this. In the case in 37 Miss. *supra*, parol proof was received of the contents of a telegraphic message, without previous proof of the loss of the original message. This was very properly held to be error. The case is not an authority either way on the question before us.

"After a careful consideration of the question, and after full examination of all the adjudications we can find bearing upon it, we have reached the conclusion that the law applicable to this case is correctly stated by Judge REDFIELD in *Durkee v. Vt. C. R. R. Co.*, *supra*.

"The same principle is also laid down in Scott & Jarnagin on Telegraphs as follows: '§ 345. In all cases where the company can be considered as the agent of the sender of the message, in controversies arising out of the communication by telegraph between the sender and the person to whom the message is addressed, the message received by such person must be regarded as the original. If it differs from the message delivered for transmission, by which the sender has suffered damage, he must look to his agent, the telegraph company, for indemnity. In such controversies between the sender and receiver, the message received is the best evidence.'"

The question of originality is not touched upon in *Trevor v. Wood* or *Dunning v. Roberts*, cited above.

REDFIELD, C. J., speaking of *Durkee v. Vt., etc., R. Co.*, above cited, in 4 Am. Law Reg. (N. S.) 402, says: "But the doctrine of this case has not been universally followed, either in this country or England," and speaks of "the preponderance of authority against that view."

Kinghorne v. Montreal Tel. Co., cited above, was an action for damages for not delivering a message, an answer to one containing an offer. The defense was "no damage," because if the message had been delivered it would not have made a contract, it being impossible to make a valid contract over the wires. The decision was that where a contract is to be made through the medium of the telegraph, "if that can be done at all," the message signed by the parties must be produced, and not the transcript from the wires. In *Matteson v. Noyes*, cited above, the court said: "The paper filed at the office from which the message is sent is, of course, the original, and that which is received purports to be a copy." This case however was limited by *Morgan v. People*, 59 Ill. 58, where the plaintiff had directed the sheriff by telegraph to suspend an execution sale. The court observed: "The case of *Matteson v. Noyes*, 25 Id. 591, merely decides that a copy of a telegram is not evidence, but that the original must be produced. The question arises what is to be regarded as the original in the case at bar? This depends upon whose agent

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the telegraph is. Where the party sending a message is the responsible party, and sends a message for the purpose of giving directions to be acted upon, then the message delivered at the end of the line is the original. Redf. on Car., etc., 400; *Durkee v. Vermont Central Railway*, 29 Vt. 127. The telegram in this case, delivered to the sheriff at the end of the line, was the original message — was evidence of its contents."

TURNER v. HOLTZMAN.

(34 Md. 148.)

Highway — obstruction — nuisance.

A stage-coach stopping for an unreasonable time on a public highway, in front of and obstructing the entrance of a camp-meeting ground, is a nuisance, and may be removed by those who are inconvenienced, or by a deputy sheriff.*

ACTION for assault and false imprisonment. The opinion states the facts. The plaintiff had judgment below.

George G. Hooper and Albert Ritchie, for appellants.

Henry Stockbridge, for appellee.

GRASON, J. The declaration in this case contains three counts, the first of which alleges that the appellants assaulted and beat the appellee and took him into custody, and held him under duress and gave him into the custody of an officer of the law, or one unlawfully and improperly claiming to be an officer of the law, and unjustly and maliciously obstructed him in the prosecution of his lawful business, and prevented him from pursuing the same, to his great loss.

The second count charges that the appellants maliciously and falsely assumed to be deputy sheriffs, or officers of the law, and by virtue of such wrongful, malicious and false assumption and claim, took the appellee into custody and detained him and prevented him from prosecuting his lawful and proper business, to his great loss and injury.

The third count avers that the appellants wrongfully, maliciously and willfully conspired and combined to injure the appellee in the prosecution of his lawful business, and to prevent him from pur-

*See *State v. Berdette* (73 Ind. 185), 38 Am. Rep. 117, and note.

suing the same, and in pursuance of such unlawful and malicious combination and conspiracy, arrested the appellee and held him under duress and in custody for a long space of time, and prevented him from pursuing his lawful business, etc.

The Superior Court of Baltimore city, in which this case was tried, granted the four prayers of the appellee and the first and twelfth of the appellants, but rejected the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth and fourteenth prayers of the appellants, and gave an instruction of its own in lieu of the appellants' sixth, seventh, eighth, ninth, tenth and eleventh prayers. The appellants excepted to the granting of the appellee's prayers, and to the rejection of all of their own prayers, which were rejected, as also to the instruction given to the jury by the Superior Court in lieu of their sixth, seventh, eighth, ninth, tenth and eleventh prayers, and the verdict being against them they took this appeal, after having interposed a motion in arrest of judgment which was overruled.

The facts appearing in proof are substantially as follows: In August, 1878, there was a camp-meeting on the land of Mr. Lazear, in Baltimore county, he having granted permission to the managers to hold the meeting on his land, upon condition that no public conveyances should be permitted to discharge or take up passengers at the entrance to the grounds, which was opposite and near to Mr. Lazear's dwelling-house, and that none but private conveyances should enter and leave the grounds at that entrance. This condition was imposed because of serious inconvenience and annoyance which he and his family had suffered from public conveyances, their drivers and passengers, during previous camp-meetings at the same place. An entrance for passengers by public conveyances was therefore arranged at a place further down the road, at a greater distance from Mr. Lazear's house, and where the road was much wider than at the entrance nearer his house. Mr. Turner, one of the appellants, was chief manager of the meeting, and held in his possession written papers signed by the sheriff of Baltimore county; one appointing him deputy sheriff at said camp-meeting during its continuance, with power to make arrests for any violation of law, and the other empowering him to appoint special officers for the preservation of order at and in the vicinity of Summerfield camp-meeting ground, with full power to make arrests for any violation of law. He wore a badge of deputy sheriff,

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as also a badge as chief manager. Stoddard was also one of the managers of the camp meeting, and was appointed a special officer by Turner, and wore the badge of deputy sheriff. During the meeting and on Sunday, the coaches of McFarland were transporting passengers for him between Baltimore city and the place of meeting, and on the morning of Sunday began to discharge their passengers at the entrance to the camp meeting which was forbidden to passengers by such conveyances; and the persons who were in charge of them put up on Lazear's land a sign directing attention to McFarland's coaches, and also placed steps for their passengers to pass over Lazear's fence into the grounds where the meeting was held. Lazear insisted upon the steps and sign being removed by the persons who had placed them there, but they refused to remove them, when they were at length removed by one of the policemen from Baltimore city. McFarland's agent and drivers were also remonstrated with by Lazear and one or more of the managers of the meeting, about bringing their passengers to this particular entrance, without effect, as they still continued to stop their coaches at this entrance and to set down and take in passengers at that point. The public road opposite this entrance is narrow, and the track of the Powhattan horse railroad occupies part of the bed of the road, leaving between fifteen and sixteen feet between the end of the cross-ties and the line of the road next the fence. The track of the railroad is raised about a foot above the level of the public road, and there is a ditch or gully between the fence and the road. Later in the day a six-horse omnibus, about twenty feet long and capable of carrying thirty-five or forty passengers, belonging to McFarland and driven by the appellee, after setting down passengers at the entrance for private carriages, passed up the road a short distance, and after a time came down again and stopped a short distance above the entrance.

Finding that this omnibus, thus standing in the road, was in the way of other vehicles, coming to and returning from the meeting and passing along the road, and obstructing their passage, the appellee, its driver, was ordered to move down the road. He then drove down and halted his horses so near the entrance into the grounds as to obstruct vehicles passing into and out of them. When the drivers of other conveyances, carrying passengers for pay, saw this omnibus standing at this entrance, they also drove up to the same place, and the road, in consequence, was so blocked up that

there was not room left for the passage of carriages between the vehicles, so remaining on the road and the railroad track, and the entrance to the meeting was so obstructed that carriages could neither enter nor leave the grounds on which the meeting was held, and the road leading from the entrance to the meeting also became blocked up. The appellee was requested to move, and he replied that he would move when he got a load. This request was made several times, and was met with the same reply. He was given time and assisted to get a load, and when it was obtained, he transferred it to another of McFarland's coaches, which came alongside to receive it. This was done three times. He was again and again requested to move his coach, and replied that he would not move unless ordered by Watkins, McFarland's agent. The managers then applied to the agent, and he referred them to the appellee. After the lapse of some time, while Turner was talking to some one, Stoddard got upon the hub of the wheel and said to appellee, "La, why don't you move?" and then got down. During the time he was making this remark to the appellee, Mr. Haslup and another person attempted to move the coach by taking hold of the leaders and endeavoring to lead them off, but the appellee put his foot on the brake, and thus prevented the coach from being moved. Haslup then suggested that the reins of the leaders should be unfastened, and they were unfastened by him and some one else. So soon as this was done, the appellee removed his foot from the brake and loosened the reins of the other horses, and thereupon the coach at once started down hill, got toward the center of the road, ran into a wagon, and was likely to collide with others, when Stoddard seized the wheel-horse and managed to stop its further progress. He then fastened the reins of the leaders and asked Turner if he wished the coach moved, who replied that he did; and thereupon Stoddard mounted to the box beside the appellee, took the reins, which were hanging loose, put his foot on the brake, and drove down the road as far as the entrance assigned for passengers brought by public conveyances. There he left the coach and horses with the appellee, who during the whole time had been sitting quietly and passively on the driver's seat. Some of the witnesses for the appellee state that when Stoddard got on the coach he said to the appellee, "I arrest you," and that he pushed the appellee's foot off the brake. Other witnesses deny that such a remark was made, or that the driver's foot was on the brake at all when Stoddard took a

seat beside him. Stoddard swears that he said nothing about arresting the driver, that he did not touch him, unless some part of his person may have come in contact with him in sitting beside him; and the appellee himself swears that Stoddard did not push his foot off the brake, but that he had taken it off himself. He also swears that he asked Stoddard when he got up beside him whether he got up as George Stoddard or as a deputy sheriff, but does not state that Stoddard made any reply to the question. Stoddard further swears that he did not arrest the appellee, and that the only thing he did say about arrest was after he had driven the coach down the hill, when some one told the appellee to drive back to the entrance, and that then he said "if he does I will arrest him." The proof shows that for a long time before the coach was removed it had stood near the entrance, and caused the obstruction in the public road which prevented other vehicles from passing, and the road consequently became blocked.

The law in regard to the use of public highways and streets has been clearly and definitely settled by numerous decisions in England as well as in this country. Persons have a right to travel over public streets and roads, stopping only for necessary purposes, and then only for a reasonable time. Stage coaches may stop to set down and take up passengers, as this is necessary for the public convenience; but this must be done in a reasonable time. A person travelling on the highway must do so in such a way as not unnecessarily or unreasonably to impede the exercise of the same right by others; and if he does not exercise this right in a reasonable manner, he is guilty of a nuisance. *Rex v. Cross*, 3 Camp. 226, *Rex v. Jones*, id. 230; *People v. Cunningham*, 1 Denio, 524; *Wood on Nuis.*, § 529.

The proof in this case clearly shows that the coach of the appellee, by remaining in the highway, under the circumstances as testified to by nearly all the witnesses on both sides, obstructed the travel over it for an unreasonable time, and was a public nuisance.

Without stopping to inquire whether any one, whose rights are not injured or interfered with by a public nuisance, may abate it, about which there is some conflict in the decisions, there can be no doubt whatever that any person, whose rights are injured or interfered with, may abate it, provided its abatement does not involve a breach of the peace. It is unnecessary to cite authorities in support of a proposition so plain and well settled. Both of the appellants

were managers of the camp-meeting, and with the other managers had control over the grounds where the meeting was held, and over the entrance to said grounds and the road leading from the entrance to the place of meeting, with the right to keep the entrance and the private road unobstructed, and this included the right to keep the public highway immediately in front of said entrance clear so that vehicles might be able to enter and leave it. This was rendered impossible by the coach of the appellee remaining for a long time so near the entrance as to prevent the ingress and egress of vehicles into and out of the meeting grounds, and to cause the public highway to be so blocked as to prevent the passing and repassing of carriages over it. Throughout the whole time during which this obstruction lasted the appellants and others, having the control of the grounds and the meeting, acted with the utmost forbearance and prudence. They made appeals to the appellee, as well as to others who had the charge and superintendence of this coach, to remove it from the place where it was standing ; nor did any one attempt to remove it until all efforts to induce the appellee, the driver, and the agents, having the superintendence of it, to move it, had failed, nor did either of the appellants interfere with the coach until the reins of the horses in the lead had been unfastened by other persons of their own accord, and the appellee had slackened the reins of the other horses and let up the brake ; and the coach had in consequence, started down the hill ; had run into one wagon and there was imminent danger of serious damage being done to others and to their occupants. Then it was that Stoddard succeeded in stopping the coach ; and having asked Turner if he wished the coach moved, who replied "yes," fastened the reins, mounted to the seat beside the appellee, took the reins, and quietly and safely drove down the hill to the entrance assigned for passengers brought by public conveyances, and there left the coach, the appellee in the meantime sitting quietly and passively in his seat. There was testimony in the case given by witnesses for the appellants as well as by some of the witnesses for the appellee, and also by the appellee himself tending to prove these facts, and if found to be true by the jury the appellee was not entitled to recover even if the coach was removed by the appellants as private individuals.

But the proof shows that Turner, one of the appellants, acted not only as a manager of the meeting, but was also a deputy sheriff of

Baltimore county, duly appointed by writing by the sheriff of that county. The court below instructed the jury that there was no evidence that the appellants were deputy sheriffs, or held any official position whereby they had authority or right to make arrests, or do any act which any private citizen might not lawfully do; and it was contended in argument in this court that the appellants were not lawfully deputy sheriffs, because they had not taken the oath of office as such. The office of under or deputy sheriff is a common-law office. No such office has been created either by the Constitution or statute law of this State. A deputy sheriff in this State, is therefore still a common-law officer, and not required to take any oath as a qualification to act as such, unless required to do so by the common law. 8 Bac. Abr. 671. Deputy sheriffs were first required to be sworn by Act of Parliament of 27 Eliz., ch. 12, and afterward by 3 George 1, ch. 15. But these statutes are not in force in this State, and are to be found in Kilty's British Statutes classed among those statutes which were found not to be applicable in this State. Turner then at the time of the alleged assault and arrest of the appellee was a deputy sheriff of Baltimore county, duly appointed and possessing authority such as the sheriff himself could exercise. 8 Bac. Abr. 675.

There can be no doubt that the sheriff has the power of keeping the peace within his county, 8 Bac. Abr. 689, and to raise the *posse comitatus* to aid him when necessary in executing his office. We think it equally clear that the sheriff or his deputy may abate a public nuisance in a public highway; and that Turner as deputy sheriff had the lawful authority to remove the coach of the appellee when he found it obstructing the public highway and preventing other parties who had the right to use the same from travelling upon it, and to remove the appellee with it if he did not choose to leave his seat, or to arrest him if he should resist him in its removal. He also had the right to call to his assistance the other appellant, Stoddard, and such other persons as he might deem necessary in effecting the abatement of this nuisance thus caused and maintained by the appellee.

It follows from these views that the court below erred in granting the four prayers of the appellee, and in the instruction given to the jury in lieu of the appellants' sixth, seventh, eighth, ninth, tenth and eleventh prayers, which were refused. All the evidence shows conclusively that the coach of the appellee constituted a public

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nuisance in the public highway, and Turner as deputy sheriff of Baltimore county had the lawful authority to remove it, as the evidence shows it was removed, and to call Stoddard to his assistance in removing it, and to remove the appellee with it if he chose to remain upon instead of leaving it, and to arrest him if he attempted to prevent its removal. All the evidence shows that the appellants were fully justified in all they did in abating the nuisance, and therefore the judgment appealed from will be reversed without granting a new trial. It is therefore unnecessary to pass upon the prayers offered by the appellants and rejected by the court below.

Judgment reversed.

CONSER V. SNOWDEN.

(64 Md. 175.)

Gift — causa mortis — delivery.

S., being ill, gave C. a written order on a savings bank for the payment to C. of a deposit standing in the bank in the name of S. A memorandum was subjoined, that "the book must be sent with this order." The book being in the possession of G., S. at the same time gave C. a written order for it. C. presented the order for the money to the bank, without the book, and the bank refused to pay it without the production of the book. S. died three months later, at a different place, but whether of the same disease did not appear. In an action by C. against the administrator of S. for the deposit, it not appearing that C. ever had the book or ever tried to get it, *held*, there could be no recovery.*

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Charles E. Garrites and Charles J. Bonaparte, for appellant.

Samuel Snowden and Thomas A. Wheelan, for appellee.

IRVING, J. This is an action of assumpsit instituted by the appellant against the appellee as administrator *c. t. a.* of Agnes Scholl. The *narr.* is in the ordinary form, with money counts, and a bill of particulars limits the claim of the appellant to the count for money had and received to the appellant's use, and defines the

*See *Robinson v. Ring*, ante, 303.

claim to be for one thousand dollars with interest accrued, which has been received by the appellee for the use of the appellant, the same having been given the appellant by the appellee's testator as a gift *mortis causa*.

The facts essential to a proper understanding of the questions presented for our decision are as follows: Agnes Scholl, who for many years was a servant in the appellant's family, was ill at Bayview Asylum, and the appellant and his daughter (Mrs. Schaefer) in March, 1877, visited her there. While there, Mrs. Schaefer testifies, "She made remarks and exclamations as though she was suffering pain; she then said she had a considerable amount of money in a bank on Gay street, which she wished to leave the appellant; he asked her to leave it to his children instead, and she requested him to prepare a will leaving it equally to witness and her two brothers; she then seemed much worried lest some accident should befall this will, and appellant suggested that she should give him an order for the money on the bank; to this she assented, and asked him to prepare such an order, and also told him to obtain her bank book from a Mrs. Margaret A. Gambrill, in whose custody she said it then was; she said she did not remember the exact amount of the balance shown by this book, but knew it exceeded one thousand dollars. On April 3, 1877, the witness and appellant went again to see her, when she signed the following will, "In the name of God, Amen! I, Agnes Scholl, of the city of Baltimore, and State of Maryland, being of lawful age and in my right mind, after due reflection, and uninfluenced by any one concerned, and of my own will and accord, do make this my last will and testament. And first, it is my will that so much of the \$65 last deposited in the Savings Bank of Baltimore as may be necessary, be expended to secure my remains a decent Christian burial. Secondly. It is my will that all my other goods and moneys and all my estate and effects whatsoever be distributed equally between Virginia M. Conser, Carlton Conser and C. Ellsworth Conser, children of S. L. M. Conser, excepting my clothes and household effects, which are stored at Mrs. Louisa Caskie's, which shall be Virginia M. Conser's exclusively. And thirdly, it is my will and pleasure that the said S. L. M. Conser, of the city aforesaid, shall see that this, my will, is fully and truly executed." This will was attested by V. Marion Conser (Mrs. Schaefer), and the appellant. The testatrix died on the tenth of July, 1877, and the will filed in the proper office and

proved by S. L. M. Conser on the 6th of August, 1877, and at the time S. L. M. Conser proved the will, he swore he received it from the testatrix, and had retained it, and knew of no other. The order given appellant on April 3, 1877, read as follows :

“ Baltimore, April 3, 1877. The Savings Bank of Baltimore, pay to the order of S. L. M. Conser, or bearer, the sum of one thousand dollars and ——— cents, and charge book No. —. Signed,

Agnes ^{her} × Scholl.” It was witnessed by V. Marion Conser. A _{mark.}

memorandum was added, “ The book must be sent with this order.” The order for the bank book was in these words, “ Mrs. Gambrill will please give Mr. Conser my bank book.” It was signed by Agnes Scholl making her mark, and was without witness. This last paper was first in appellant’s possession, and was afterward given to the witness, Mrs. Schaefer, who never gave it back as she remembers, and after search it cannot be found, and witness thought it was lost. The order for the money, after it was given the appellant, witness and the appellant took to the bank and exhibited, and were told the money was there, and the order in proper form, but could not be paid till the book was produced. No proof was offered that the book was ever in appellant’s hands, or that he ever made any effort to get it. It was not shown what became of the bank book. But the appellant, to raise the presumption that it was never returned to the testatrix, proved by a daughter of Mrs. Gambrill, the custodian of it, that for many years prior to the 3rd of April, 1877, her mother kept a bank book for Mrs. Scholl ; that it was kept in her wardrobe ; that witness lived with her mother, and had never known of this book being given up prior to April 3, 1877, and believed it was then in her custody. About that time her mother was frequently absent from Baltimore, visiting in Anne Arundel county. The appellant having closed his case without offering any other proof than what has been herein incorporated, the appellee was required by the court to ask an instruction “ that under the pleadings in this cause there is not sufficient evidence on which the plaintiff can recover, and their verdict must be for defendant.” This was done, and the instruction was granted. The granting of this prayer and the refusal to permit the appellant to testify as a witness are the only subjects of exception. We will consider them in reverse order, and first pass upon the second exception, which relates to the instruction given the jury.

The appellant contends that all the requisites necessary to the perfection of a gift *mortis causa* co-exists in this case, and especially complains that in deciding that a sufficient delivery was not effected so as to entitle the appellant to recover, the court improperly held there was no difference in the legal essentials of delivery in a gift *mortis causa* and one *inter vivos*. To sustain this view very many cases have been cited and relied on, which it will not be necessary for us to review or refer to, for the doctrine is well settled in Maryland that there is no difference in the legal requirements to make a good delivery in gifts *inter vivos* and *mortis causa*. According to the decisions in this State, if the delivery in this case was not such as would have made an effective gift *inter vivos*, it will be insufficient to perfect an attempted gift *mortis causa*. *Pennington v. Gittings' Ex'r*, 2 Gill & J. 217; *Bradley v. Hunt*, 5 id. 58 (23 Am. Dec. 597); *Hebb v. Hebb*, 5 Gill, 509; *Taylor v. Henry*, 48 Md. 559; s. c., 30 Am. Rep. 486. Justice WOODWARD, in *Mitchner v. Dale*, 23 Penn. St. 59, concisely defines a gift *mortis causa* to be that of a "chattel made by a person in his last illness, or in *periculo mortis*, subject to the implied condition that if the donor recover, or if the donee die first, the gift shall be void."

In *Taylor v. Henry*, 48. Md. 550; s. c., 30 Am. Rep. 486, this court says, "In order to render a perfect *donatio mortis causa* three things must concur: 1. That the gift be made with a view to the death. 2. That it be with a condition, either express or implied, that it shall take effect only on the death of the donor by a disorder from which he is then suffering; and 3. That there be a delivery of the subject of the donation." In that case, as here, the claim was made to a fund on deposit in bank, which was claimed as a gift of that character. In that case the deceased was suffering from the disease of which he died. After the deposit of the money in bank to the credit of himself and his sister, and subject to the order of the survivor of them, the deceased made a will in which he disposed of his estate between his mother and sisters, one of whom was the claimant, afterward of all as a gift. He had no property but that fund. The court held it to be clearly neither a gift *inter vivos* nor *mortis causa*. In *Pennington's* case the alleged donor had a certificate of stock in the Commercial and Farmers' Bank of Baltimore, which shortly before his death he indorsed and handed to the donee, saying he gave her the stock; but the certificate was not in the lifetime of the testator taken to the bank that the stock might be

transferred to Mrs. Patterson on the books of the bank. The court held that it was stock which was intended to be given, and there was therefore no delivery of it. The court said it was like the case of *Tate v. Hilbert*, 2 Ves. Jr. 112, where a man, a short time before his death, gave a check on his banker, which was not presented for payment before the death of the donor, and it was held that as the check was not presented and paid in the life-time of the maker the intended donation of the money was defeated for want of delivery; notwithstanding the holder of the check by presenting and obtaining payment in the life-time of the maker could have perfected the gift. This case of *Tate* is fully adopted by the court in *Pennington's* case as laying down the law properly; and the court say with reference to the question before them, whether it was an attempted gift *inter vivos* or *mortis causa*, made no difference. If in the *Tate* case the holder of the check was not entitled to relief in equity, it is very clear that this appellant was not entitled to recover upon his proof from the appellee, administrator of Agnes Scholl, in his suit at law. In this case it was the money which was sought to be given, and an order was given for its payment to the appellant, and although he does not appear to have gone to the bank with his order, he was not paid, but was told it could not be paid without the bank book being brought with the order. Indeed he had notice of this rule of the bank, for it appears the very order which he took contained a notice indorsed that the bank book must be presented with the order. It is true he appears to have had an order on the custodian of the bank book for its delivery to him; but it does not appear that he ever made any demand for it, or ever obtained it, or ever made further effort to procure the money from the bank. The money which it is alleged was sought to be given was never obtained, and according to the principles settled in the cases already referred to, the gift was not perfected by a sufficient delivery of the thing given, in the life-time of the appellee's testator. Although such gift depends for its absoluteness on the death of the giver from the disorder threatening life when the gift was made, so that recovery would revoke it, still for the time being and until recovery, the absolute dominion over the thing given must be parted with at the time of the gift. In this case it is clear that so long as the money was in the bank in her name, she or any other person with an order from her, on presenting the bank book, could have drawn the money, notwithstanding the appellant had an order

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for it. He never was in condition to secure the payment from the bank, and payment by the bank to any one else properly equipped with an order and the book, would have been legitimately made. Standing, as the money did in Agnes Scholl's name, at the bank when she died, it devolved upon the legal representative, who has properly possessed himself of it, and the appellant has no enforceable claim against the appellee or the fund. In addition to the defective delivery, on which ground we were told at the hearing, the court below based its instruction, there was a serious failure of proof as to the disorder of which the alleged donor died. As we have already said it was essential, to make the attempted gift, an effective gift *mortis causa*, that the donor should die of the very disorder with which she was suffering when the gift was made, and that there should have been no intervening recovery. In this case the character of the sickness with which she was suffering at the time the transaction took place, was very imperfectly described. She is represented as making exclamations indicative of suffering, and that is all. At that time she was at Bayview Hospital. She died in an entirely different institution — St. Agnes Hospital, to which she removed. How or when she removed does not appear. Whether the same disorder with which she was suffering on the 3d of April continued, and finally proved fatal, is not shown. We only know that three months and more after the 3d of April she died in an entirely different locality. There is not a tittle of evidence as to the final cause of death; so that another ingredient of a gift *mortis causa* is entirely wanting. There was no error therefore in the instruction given by the court, to which exception has been taken. Having decided that there was in this case no gift *causa mortis*, it becomes wholly unnecessary to decide the question of evidence; for even admitting the court erred in the refusal to permit the appellant to testify, but upon which we express no opinion, the appellant was not prejudiced by it. We are not informed what he expected to prove, but it is very certain he could not prove the delivery of the money to him, for if he had got it he would not now be suing for it. The judgment will be affirmed.

Judgment affirmed, with costs.

 Baltimore Permanent Building and Land Society v. Smith.

BALTIMORE PERMANENT BUILDING AND LAND SOCIETY v. SMITH.

(34 Md. 187.)

Vendor and purchaser — contract — evidence—"about"—measure of damages.

On a contract to convey "about sixty-five acres," the vendee is not bound to accept thirty or thirty-six acres.*

In an action by the vendee for breach of such a contract, parol evidence is inadmissible to prove a sale of sixty-five acres, or the vendor's representations that there were at least sixty-five acres.

In such an action, the vendor having acted in good faith and without fault, the measure of damages is the purchase-money paid, with interest, and the expenses of the plaintiff for travel, board, and counsel fees while attending to the execution and fulfillment of the contract.

ACTION for breach of contract for sale of land. The opinion states the facts. The plaintiff had judgment below.

Samuel Snowden and S. Teackle Wallis, for appellant.

Charles Marshall, for appellee.

BARTOL, C. J. This is an action instituted by the appellee, for the breach of a contract made with him by the appellant, for the sale of a parcel of land. The contract is dated February 16, 1877. The property, which is the subject-matter of the contract, is therein described as "all that property situate and lying in Calvert county, Md., containing about sixty-five acres, being a part of the property known as 'Solomon's island,' and which was purchased by said Land Society from Phillip M. Snowden, trustee, under a decree passed by the Circuit Court for Calvert county, in equity, in the case of the Baltimore Permanent Building and Land Society against Isaac Solomon and wife, except eight or nine small lots, since sold by it, which lots were mentioned in leases made by said Solomon, after the mortgage given by him to said Society."

The consideration or price to be paid by the appellee was \$12,000, "to wit, \$500 in cash, \$4,500 on or before the 14th day of April, 1877, and the balance, to wit, \$7,000, to be paid in two years from the date hereof, to be secured by mortgage on the property hereby

* So in *Paine v. Upton*, N. Y. App. Jan. 1882, the deed calling for "about 200 acres, more or less," and there being but 206 acres the plaintiff recovered back the excess of the purchase price paid.

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agreed to be sold, with interest payable semi-annually." The cash payment of \$500 was made.

By the covenants of the parties a deed was to be made by the vendor on payment of \$4,500, as stipulated, and a mortgage executed by the purchaser to secure \$7,000, the balance of the purchase-money.

It was "agreed that the title to the property was good and clear of all incumbrances."

The contract was signed by the appellee at the office of his attorney in Philadelphia. He had never seen the property and asked Wilton Snowden (secretary), who represented the appellant, for a plat. When the secretary returned to Baltimore, "he wrote to the agent of the company for a plat made by Mr. Grover in 1872. The agent replied he would have the plat in a few days;" on the 6th of March the secretary received a letter and the plat; on seeing it he discovered a considerable discrepancy between the number of acres mentioned in the contract and that shown on the map. He soon after notified Mr. Beman in Baltimore (who had a written agreement with the appellee, dated February 13, for one-half interest in the purchase), showed him the plat and requested him to inform the appellee of the discrepancy, which Beman did by letter the same day. Beman's letter was dated March 13, and received by appellee the following day when, as he testifies, he first heard that there were less than sixty-five acres of land.

On the 17th day of March appellee went to Baltimore, started thence on the night of the 18th, to visit the island in company with Beman and Wilton Snowden; returned to Baltimore on the evening of the 19th, and went to Philadelphia the same night. Saw nothing more of the company till the 14th day of April, when he tendered \$4,500, and demanded a conveyance of sixty-five acres. The answer was that "they had not got it, could not do it," or words to that effect, "that they had not the land. Snowden testifies that "appellee demanded sixty-five acres, declining to accept the deed and execute the mortgage because there was not sixty-five acres of land. he wished a proposition, the company offered to abate \$2,000 for the deficiency, which was declined, invited a proposition from him, which he declined to make. Then the company said they were willing to pay back the \$500 and cancel the agreement. About two months afterward the \$500 was tendered to him in Philadelphia which he declined to accept."

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It appears that on the 21st day of March preceding, an abstract of title was sent to the appellee by the secretary, which with the plat was placed by him in the hands of Mr. Robinson, his attorney, who under his instructions went to Calvert county on the 7th day of April and made a careful and thorough examination of the title, which proved satisfactory. Mr. Robinson states that the only objection was the deficiency of land. He states that "he was not sent down to examine the title till after the appellee knew, and he knew that the quantity of acres was deficient."

On the 10th day of August, 1877, the following letter was sent to the appellee and received the following day:

"BALTIMORE, 10 Aug., 1877.

"LEVI F. SMITH, Esq.

"*Dear Sir*—I write to announce to you that by a survey of Solomon's island, made by order of the board of directors of this society and completed a few days ago, there were found 48.08 acres in the entire island. After deducting lots sold and leased previous to the agreement with you, there were found thirty-six acres.

"Yours truly,

"WILTON SNOWDEN,

"Secretary."

The suit was instituted on the 27th day of November, 1877.

The declaration contained two counts; to the first the defendant demurred and the demurrer was sustained. On this ruling no question has been raised. The case was tried below on the issue joined upon the plea to the second count. This count sets out substantially the contract, and alleges a breach by the appellant in failing and refusing to execute and deliver a deed conveying about sixty-five acres of land; claims damages for this breach, and also special damage for expense and trouble incurred by the plaintiff, and for moneys expended by him for legal advice and counsel in the investigation of the title, etc.

The first exception to be considered is that taken to the parol evidence offered by the plaintiff, of the representations by Snowden as to the number of acres, made before and at the time the contract was signed. This is found in the testimony of Smith, the plaintiff, Robinson and Snowden, which was admitted subject to exception, and the appellant, by its fourth prayer, asked to be excluded.

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as inadmissible, because it tended to contradict, alter, or explain the terms of the written contract.

[Omitting the testimony.]

There is no rule of law better settled or more inflexible, than that which excludes parol evidence which is offered to vary or contradict the terms of a written contract. The rule on this subject is distinctly stated in *Rice v. Forsyth*, 41 Md. 402, as follows: "It is a cardinal rule that parol or extrinsic evidence is inadmissible to add to, contradict or vary the terms of a written contract. It may be admitted to ascertain and make certain the parties and subject-matter of an agreement, to apply the contract to its subject, to prove any collateral independent fact about which the written agreement is silent, and to remove latent ambiguities. In such case it is used not to contradict or vary the written instrument, but to uphold and enforce it as it stands." It is sometimes a matter of some nicety to determine whether in a particular case the parol evidence offered falls within the general rule, and few subjects have given rise to more difficult and perplexing questions for decision. In cases of latent ambiguity, parol extrinsic evidence is always admissible to remove such ambiguity, so that the contract may be applied to the subject-matter. Cases of this kind have no application here, and need not be cited. Sometimes the parol evidence is offered to prove some collateral, independent fact, or agreement between the parties about which the written contract is silent; in such case it is admissible.

Examples of the application of this rule are found in *McCreary v. McCreary*, 5 G. & J. 147; *Creamer v. Stephenson*, 15 Md. 221; *Basshor v. Forbes*, 36 id. 154. Many other cases might be cited; among them may be classed *Erskine v. Adcane*, L. R., 8 Ch. App. 756, 765, 766, cited by appellee, who contends that the present case falls within the same class. A brief recurrence to the terms of the written contract and the parol evidence clearly shows that this contention cannot be supported.

The written contract in terms stipulates for the sale of a parcel of land, described as part of Solomon's island, containing about sixty-five acres. The purpose of the parol testimony is to prove a sale of sixty-five acres of land, without qualifying words, and also to prove representations made by the agent of the vendor, that the number of acres contained in the parcel sold was at least sixty-five, and that such representations induced the appellee to sign the contract

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Now this testimony cannot be said to relate to an independent collateral fact ; on the contrary, it refers to the very subject-matter embraced in the writing, to wit : the quantity or number of acres ; and its effect is to bind the appellant absolutely to convey at least sixty-five acres ; whereas in the writing such a stipulation is not found, unless indeed such is the true meaning and construction of the writing, in which case the parol testimony has no significance ; out of this we shall speak hereafter. It is difficult to understand why the effect of the parol testimony, if it have any effect, is not to add to or vary the terms of the written contract. If the latter had contained nothing about quantity, or the number of acres had been mentioned with the strongest words of qualification, such as “ be the same more or less ” the objection to the admissibility of the parol evidence would be perhaps more obvious, but certainly would rest upon no other principle or reason than that which exists in the present case. The legal question would be the same.

In dealing with this proposition, it is important to bear in mind the nature of this proceeding, and the pleadings in the case. Here the suit is on the written contract. In another form of proceeding, if for instance the suit were by the vendor to enforce the contract, and the purchaser were defending upon the ground of fraud, or mistake or misrepresentation as to quantity, whereby he was induced to enter into the contract, the parol evidence would be clearly admissible. But such is not the nature of the case ; the appellee does not impeach the validity of the written contract, but has declared upon it as binding, and seeks to recover damages for its breach by the appellant. No fraud or misrepresentation is alleged, nor could it be, in the form of action selected. In such case the appellee must stand or fall upon the terms of the written paper, and it is not competent for him to set up by parol another and different contract from that on which he has declared. *Watchman v. Crook*, 5 G. & J. 239 ; *Kribs v. Jones*, 44 Md. 397. And this objection applies with special force in a case like the present where the contract is within the statute of frauds and required to be in writing. *Taney v. Bachtell*, 9 Gill, 205.

For these reasons we are of opinion the parol evidence referred to was inadmissible, and there was error in refusing the appellant's fourth prayer, which asked that it be excluded, and for the same reasons the first prayer of the appellee was erroneously granted, which referred to the parol evidence, and made it a part of the hypothesis of the prayer.

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The next question arises upon the construction of the written contract, upon which alone depends the appellee's right to maintain the suit.

By the first prayer of the appellant the court was asked to instruct the jury, "that by the true construction of the agreement, the quantity of land did not enter into the essence of the agreement, and the plaintiff took upon himself the risk of the number of acres contained in the parcel mentioned in the agreement, and was therefore bound to complete the contract, by the acceptance of a deed for as much land as the part of the island mentioned actually contained, subject to the exceptions therein referred to. * * *

And after his refusal to do so, the plaintiff was entitled to treat the contract as rescinded, and the plaintiff can only recover the sum of \$500, paid by him, with interest at the discretion of the jury."

The proof shows that the part of the island embraced in the contract of sale comprised in fact only from thirty to thirty-six acres, for the evidence differs as to this. The largest number as stated in the survey made at the instance of the appellant is thirty-six acres. The question therefore is whether a contract to convey "about sixty-five acres" can be performed by conveying thirty-six acres, and this turns upon the meaning or construction of the word "about" as it appears in the writing.

The general rule as stated in *Marbury v. Stonestreet*, 1 Md. 147, is, where land is sold and the number of acres is stated, that quantity is of the essence of the contract, or forms a material consideration with the purchaser, whether the sale be for a gross sum or by the acre, unless there is something in the terms of the contract to show the contrary.

Where the sale is for a gross sum, and there are qualifying words used such as "more or less," or equivalent expressions, they have been held to import that quantity does not enter into the essence of the contract. *Stebbins v. Eddy*, 4 Mas. 119; *Jones v. Plater*, 2 Gill, 128; *Stull v. Hurtt*, 9 id. 446; *Hall v. Mayhew*, 15 Md. 551; *Slothower v. Gordon*, 23 id. 9; *Tyson v. Hardesty*, 29 id. 305. But what is the force and effect of the qualifying words "about sixty-five acres" in this contract? Does it import that quantity was not a material part of the contract? and can the court so declare as a conclusion of law?

We think not. The force of the qualifying word, we think, is

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simply that while the parties do not bind themselves to the precise quantity of sixty-five acres, it imports that the actual quantity is a near approximation to that mentioned, that is to say, within a fraction of an acre, or perhaps it might cover a discrepancy of one or two acres.

It cannot be construed to mean that the parties were contracting without regard to the area, or that the appellee took the risk with regard to the quantity. He was not acquainted with the property, had never seen it. Its character and position, the mode in which it was occupied, and the purposes for which it was contemplated to be used, as shown by the evidence, preclude the idea that it was a purchase in gross without regard to quantity, and that the contract could be performed by conveying about half the number of acres mentioned in the contract. Thirty or thirty-six acres cannot be construed to be about sixty-five acres. In *Bourne v. Seymour*, 16 C. B. 336 (31 E. C. L.), a contract for the sale of "about five hundred tons nitrate of soda" was construed to be a contract for the sale of five hundred tons, with such exception by the word "about" as the variance usually found to exist in such cases, arising from some little difference in the mode of weighing, and that it was not performed by delivering four hundred tons.

So in this case we construe the contract to be an agreement to sell and convey land containing sixty-five acres, with no other qualifications than such slight variation as might be found in its actual measurement. The appellee was not bound to accept a conveyance of thirty or thirty-six acres. The first prayer of the appellant was properly refused.

The next question to be considered is the measure of damages, and in deciding this question we shall dispose of that raised by the appellant's exception to the evidence with reference to the contract of sale by the appellee to R. D. Wilson referred to in the sixth prayer of the appellant.

By granting the second prayer of the appellee the jury were instructed that "the measure of damages is the amount they may find the plaintiff paid to the defendant under the contract, with interest as the jury may allow, and the personal expenses they may find the plaintiff reasonably incurred in and about the performance by him of the contract, including such fees to his professional adviser in the premises, for services rendered after the execution of the contract, as the jury may believe to have been reasonable. And also

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the difference between the price agreed to be paid for the land by the plaintiff, and the actual market value thereof on the 14th day of April, 1877; and in ascertaining the market value of the land at that date, the jury are entitled to consider any circumstances existing at the time, established to their satisfaction, which tended to affect the market price of the property on that day."

The general rule in case of a breach of contract of sale by a vendor is to award such damages to the purchaser as will place him, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled. *Engel v. Fitch*, L. R., 3 Q. B. 330. "When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when it should be delivered." * * Sedg. on Meas. of Dam. 313 (6th ed.). On page 315 the author remarks, "it will be observed that in laying down this rule the analogies of real estate are departed from, and the price paid, or the consideration money, is not considered conclusive, but that the actual value is inquired into." In the case of a breach of a contract to convey land, a different rule was established in England at a very early day. In *Flurean v. Thornhill*, 2 W. Bl. 1078, the purchaser was denied all profit for the loss of his bargain.

The law is thus stated by Sugden: "If the purchaser declare on the common money counts, he of course cannot obtain any damages for the loss of his bargain; and even if he affirm the agreement by bringing an action for the non-performance of it, he will obtain nominal damages only for the loss of his bargain; because a purchaser is not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost, where the vendor is without fraud incapable of making a title." *Vendors and Purchasers*, 358 (14th Eng. ed.).

The learned author cites *Flurean v. Thornhill*, and a number of other decisions. Although that case has been sometimes criticised, and perhaps departed from in some degree by *Hopkins v. Grazebrook*, 6 B. & Cres. 31, which in the opinion of Sugden cannot be reconciled with it, yet he says "it is much too late to impeach the authority of that case, which moreover was properly decided." It has been followed in a great number of cases; among them may be

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cited *Hadley v. Baxendale*, 9 Exch. 341; *Walker v. Moore*, 10 B. & C. 416, 422; *Worthington v. Warrington*, 8 C. B. 134; *Pounsett v. Fuller*, 17 id. 660; *Sikes v. Wilde*, 1 B. & S. 687, and 4 id. 421; *Bain v. Fothergill*, L. P. 6 Exch. 59. *Engel v. Fitch*, L. R., 3 Q. B. 314.

The rule in England, as deduced from the decided cases, is thus stated in 2 Add. on Cont., § 529: "If the vendor had reasonable ground for believing that he was the owner of the property and had a right to sell at the time he agreed to sell, but is prevented by an unexpected defect of title from completing his engagements, and is ready to do all that he possibly can to fulfill the contract, the purchaser will only be entitled to recover nominal damages, together with his deposit (if a deposit was paid) with interest, and the expenses he has incurred in investigating the title and searching for judgments."

In *Hammond v. Hannin*, 21 Mich. 374, the cases in the United States are collected and reviewed by Judge COOLEY in an able opinion and the following conclusions are stated as the rule of damages: "If the vendor acts in bad faith — as if having title he refuses to convey or disables himself from conveying — the proper measure of damages is the value of the land at the time of the breach; the rule in such case being the same in relation to real as to personal property. But on the other hand, if the contract of sale was made in good faith and the vendor for any reason is unable to perform it, and is guilty of no fraud, the clear weight of authority is that the vendee is limited in his recovery to the consideration money (paid) and interest, with perhaps in addition the costs of investigating the title."

Many cases are cited by the learned judge in support of these propositions, some of which are referred to in the appellant's brief.

Mr. Sedgwick also states this as the rule generally followed in this country as well as in England. And the same rule applies where the inability to perform the contract proceeds from a deficiency in the quantity of land, unknown to the vendor without his fault, as where it proceeds from a defect in the title.

This question does not appear to have arisen or been decided in this State.

Cannell v. M'Clean, 6 H. & J. 297, was an action on a bond conditioned for the conveyance of land; the purchase-money was paid and the condition of the bond being broken, the Court of Appeals

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held, reversing the judgment of the County Court, "that the value of the land at the time of the breach of the contract was the measure of damages." In that case, so far as appears in the report, the question of good faith on the part of the vendor was not raised. There was no evidence of his inability to convey or excuse, or explanation for his failure to perform his contract. So far as appears the breach of the bond was a willful act on his part, and the court laid down the same rule of damages as applicable to contracts respecting personal property. We do not question the correctness of that decision or mean to depart from it; in our judgment the rule there adopted has no application to a case like the present.

In *Dyer v. Dorsey*, 1 G. & J. 440, there was a contract by the vendor that a deed should be executed to the purchaser by third persons who held an outstanding title; the contract being broken a suit was brought thereon by the purchaser, and the court decided that "the sum of money which it might be necessary to pay for obtaining the outstanding title was the true measure of damages."

In *Marshall v. Haney*, 9 Gill, 251, the court held that the time at which the breach occurred was the period at which the value of the lands should be estimated in assessing damages. P. 260. This was said with reference to the second breach, which charged that the defendant, after making the contract, had conveyed a part of the lands to another person.

In *Rawlings v. Adams*, 7 Md. 26 (51), it was held that the rule adopted in *Cannell v. M'Clean* in regard to the measure of damages could not be applied to the case then under consideration.

We need not refer particularly to the facts of that case, or to those of *Clagett v. Easterday*, 42 Md. 617, as they furnish no analogy to the present. In the case last cited, the general rule was stated as in *Cannell v. M'Clean*, but under the circumstances of the case it was held that the rental value of the land was the proper measure of damages.

In none of these cases was the particular question decided, which is here presented.

That is to say, what is the true measure of damages, where the vendor has acted in good faith, and without fault, and is unable to convey the land, from causes beyond his control, and which he could not with reasonable diligence foresee. That is the case presented by the second prayer of the appellant, which in our judgment states the rule of damages correctly, and ought to have been

granted, except for the last part of it, which denies to the appellee the right to recover for money paid counsel, for investigating the title, if such expenses were incurred by him after he was notified of the deficiency in the quantity. This part of the prayer, we think, was erroneous, and there was no error in refusing it. The appellee was not bound to be governed by such notice, but was entitled to go on and ascertain the facts for himself, both as to the state of the title and the number of acres contained in the island. It appears moreover that it was not till the 10th day of August, 1877, that specific notice was given to him of the actual area of the island, which was long after he had incurred the expense of investigating the title.

It follows from what has been said, that there was error in the ruling of the court below in the first and second bills of exception, and in granting the first and second prayers of the appellee, and refusing the fourth and sixth prayers of the appellant.

The appellant's third prayer was correctly refused for the reason stated by the judge of the Superior Court.

Judgment reversed, and new trial ordered.

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(54 Md. 283.)

Slander and libel — privileged communication

A professor at the United States Naval Academy at Annapolis placed his written resignation in the hands of the superintendent of the academy, to be forwarded to the secretary of the navy. The superintendent being required by law to indorse his opinion thereon, indorsed his opinion stating why he thought the resignation should be accepted. *Held*, that this indorsement was presumptively but not absolutely a privileged communication.*

ACTION of libel. The opinion states the point. The defendant had judgment below.

John Thomson Mason and Charles J. Bonaparte, for appellant.

J. Wirt Randall and John H. Thomas, for appellee.

* See *Shurtleff v. Parker*, post.

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BRENT, J. The libel charged in the declaration consists of an indorsement written by the appellee upon a letter of the appellant, tendering his resignation of the position of teacher of French in the United States Naval Academy at Annapolis. The letter, it is alleged, was addressed to the appellee, an officer in the United States navy, and then in command and authority over the Naval Academy, to be by him transmitted to the secretary of the navy. Before being so transmitted, it is charged that it was falsely and maliciously indorsed with the alleged libel.

To the declaration the appellee pleaded *non cul.*, and limitations in two forms — 1st. That the cause of action did not accrue within one year; and 2d, that the alleged writing and publishing was not within one year before the commencement of this suit.

Issue was taken to the plea of *non cul.*, and the appellant replied to the pleas of limitations that he was kept in ignorance by the fraud of the defendant, of the cause of action accruing to him, and did not discover or know of the said fraud, nor could the same have been discovered or known of by him, with usual and ordinary diligence on his part, before or until the third day of February, 1876, and that at the last mentioned date, the defendant was absent out of this State, and so remained until less than one year before this suit was brought. And the same as to the writing and publishing.

To each of these replications, the appellee filed four rejoinders, denying *seriatim* each one of the several facts alleged. Issues were thereupon joined by way of rebutter, and upon this state of the pleading, the case proceeded to trial.

[Omitting minor matters.]

The defendant, after the objection of the plaintiff as stated in the first bill of exceptions was overruled, proved that the book marked "Defendant's Exhibit A.," contains the regulations for the government of all persons attached to the naval service of the United States, which were in force on the 4th of October, 1872, and were in force during the whole of the defendant's connection with the Naval Academy at Annapolis. These regulations purport to have been established by the secretary of the navy in March, 1870. Their binding effect upon the defendant cannot be questioned. The act of Congress, Rev. Stat. U. S., § 1547, passed in accordance with article 1, § 8, of the Constitution of the United States, by express terms, provides that the orders, regulations and instructions

issued by the secretary of the navy are to be recognized as the regulations of the navy.

Number 1448 of these regulations directs that "All officers through whom communications from inferiors are to be forwarded to the department, one of the bureaus, or any authority higher than themselves, must forward the same, if couched in respectful language, as soon after being received as practicable, and they will invariably state their opinion in writing, by indorsement or otherwise, in relation to every subject presented for decision." The resignation of the plaintiff was placed in the hands of the defendant, then superintendent of the Naval Academy, to be forwarded to the secretary of the navy for his decision. The regulation referred to plainly required the appellee to state his opinion in writing, by indorsement or otherwise, in regard to the propriety of its being accepted. This he did by making the indorsement complained of. It was therefore made in the line of his duty, and one of the questions presented by the second exception is whether or not this indorsement is a privileged communication, and if so, to what extent?

There are two classes of privileged communications which form exceptions to the general law of libel. The one is absolutely privileged and cannot be sued upon, while the other may be the cause of action, and the suit upon it maintained on proof of actual malice. These privileges rest alone on the ground of public policy, and in speaking of them we have no reference to privileges which are secured by constitutional or statutory provisions.

A great number of authorities have been referred to, and they have been examined with care. There is but little conflict among them in relation to the class of communications which are regarded as absolutely privileged. The classification in Starkie on Libel and Slander well states the conclusions drawn from the great bulk of the cases. Those enumerated by the author as being absolutely privileged, though false and malicious, and made without reasonable or probable cause, "are communications made in the course of judicial proceedings, whether civil or criminal, and whether by a suitor, prosecutor, witness, counsel or juror; or by a judge, magistrate, or person presiding in a judicial capacity, of any court or other tribunal, judicial or military, recognized by and constituted according to law; and so also communications made in the course of parliamentary proceedings, whether by a member of either house of Parliament, or by petition of individuals who are not members,

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presented to either house or to a committee thereof." Folkhard's Starkie, § 688, and authorities there cited. Beyond this enumeration we are not prepared to go. The doctrine of absolute privilege is inconsistent with the rule that a remedy should exist for every wrong, that we are not disposed to extend it beyond the strict line established by a concurrence of decisions.

There is a class of communications which the courts will not require to be produced in evidence, where those having the custody of them object to their publicity on the grounds of public policy. Such are official communications to the heads of government, and between its different departments. And under this head are most of the authorities cited by the appellee. "And where the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same in effect, namely, receiving secondary evidence of their contents." 1 Greenl. Ev., § 251. Whether this communication, being from an officer of the navy to the secretary of that department, is embraced in this class, is not a question raised by this record. It appears from it that the secretary not only does not object to the publicity of the communication, but has furnished a certified copy of it upon the express statement of the appellant's counsel that it was intended for use in this particular case.

We cannot, in view of the authorities or upon principle, hold the communication declared upon to be absolutely privileged. It was made in the line of duty, and this only clothes it with a privilege that is qualified. The occasion operates as a defense unless express malice be proved. Folkhard's Starkie, § 679 (M.), p. 518.

In *Cook v. Hill*, 3 Sandf. 349, the court say: "We are not much inclined, after considering the authorities, to extend the doctrine of absolutely privileged communications. We shall conform to the settled rule as far as the law has carried it, but we shall go no further.

* * * The doctrine has not been extended here beyond legal proceedings, and applications, memorials and similar matters presented to the legislature and growing out of legislative proceedings.

* * * The other class of privileged communications for which there is no absolute privilege is very numerous. In order to make the writer or publisher liable, it must appear that he acted maliciously and without probable cause. If there were no probable cause for the communication the law implies that it was made with malice. If however it appear that there was probable cause, the communication is privileged no matter how much actual malice dictated it."

In *Garrett v. Dickerson*, 19 Md. 450, the general doctrine is announced that "the only effect of privilege on actionable words is to rebut the legal inference or presumption of malice, and to that extent constitute a good defense in an action on them." In *White v. Nicholls*, 3 How. 267, where the question of privilege was presented, the Supreme Court refused to extend the doctrine of absolute privilege to cases where the author of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral. In speaking of it as embraced by the "exceptions" to the general law of slander and libel, the court say on page 287: "But the term 'exceptions,' as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actions or transactions placed above the cognizance of the law, absolved from the commands of justice. It is difficult to conceive how in society, where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti*, and still more difficult to imagine how such a privilege could be instituted or tolerated upon the principles of social good. The privilege spoken of in the books should in our opinion be taken with strong and well-defined qualifications. It signifies this and nothing more. That the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter or with the situation of the parties, adequate to authorize the conclusion." The doctrine announced in this case in relation to the privilege of those acting in a judicial capacity has been modified and explained in the subsequent case of *Bradley v. Fisher*, 13 Wall. 335; but there is nothing in that case in any way in conflict with the doctrine announced in respect to communications or words spoken in the discharge of a duty.

The case principally relied upon by the appellee is that of *Dawkins v. Lord Paulet*, L. R., 5 Q. B. 94. This case is one at *nisi prius*, and does not carry with it the weight of decisions by courts of last resort. An opinion is delivered by each of the three judges who sat. Two of them held the communication to be absolutely privileged. But we think the entire force of their decision is taken away by the able dissenting opinion of COCKBURN, C. J. He discusses very fully the question of public policy which it was claimed required a communication from an officer in the army to his su-

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perior to be absolutely privileged, and in his review of the authorities satisfactorily, in our opinion, shows that they do not support the views of the majority of the court. The alleged libel in that case consisted of communications from an officer of the army "in the course of military duty and as an act of military duty." It was claimed that they were absolutely privileged. But Chief Justice COCKBURN thought differently, and was of opinion that an action would lie if the communications were made of actual malice and without reasonable and probable cause. We concur in the views taken in his opinion, and believing that they state the true rule of the law, shall adopt them rather than the conclusions reached by the two judges who sat with him.

In *Dickson v. Earl of Wilton*, 1 Fost. & Fin. 419, where the alleged libel consisted of communications from an officer of the army made in the course of duty, the question of privilege was raised by the attorney-general, Lord CAMPBELL, C. J., who sat in the case, seeming to think it so clear the communications were not absolutely privileged, that he did not even refer to them in that connection. "The first question," he says, "is, whether these were what the law called privileged communications; for if so, the defendant is not called upon to prove their truth, provided they were made in good faith. The law most reasonably says, that what is written or spoken in the course of business, or in a matter of serious interest, where a person has a duty to perform, or an interest to consult, and addresses a person who has a like interest, and a relative duty to perform, the communication is privileged. * * * Whether or not the occasion gives the privilege is a question of law for the judges; but whether the party fairly and properly conducted himself in the exercise of it is a question for the jury."

We deem it unnecessary to multiply the citation of cases upon this question of privilege. We are satisfied that the communication in question does not fall within the class of communications which are absolutely privileged. We hold it however to be privileged, to the extent that the occasion of making it rebuts the presumption of malice, and throws upon the plaintiff the *onus* of proving that it was not made from duty, but from actual malice and without reasonable and probable cause.

[Omitting minor questions.]

Judgment reversed and new trial ordered.

MILLER, J., dissented.

REIER V. STRAUSS.

(54 Md. 278.)

Negotiable instrument — protest — residence of indorser.

Where an indorser of a note at the time of indorsing lived at Baltimore, and continued there sometime afterward, but at the time of dishonor of the note had removed from the city, but retained his sign at his old place of business and his name in the city directory, *held*, that the notary being ignorant of his removal, he was properly treated, in the protest of the note, as still a resident of that city.

ACTION against indorser on a promissory note. The opinion states the point. The plaintiff had judgment below.

J. T. McGlone, for appellant.

Isidor Rayner, for appellees.

BOWIE, J. [Omitting a minor and statutory point.] The appellees, admitting, for the sake of the argument, that the portion of the protest excepted to was inadmissible, yet contend that the error was immaterial, as the appellant was not injured by the testimony; that it was not necessary for the notary to make any search or inquiry for the residence of the indorser; that a letter mailed through the Baltimore post-office to his address, was all that the law required; hence the recital of diligent search and inquiry was superfluous in the protest. In other words, that the defendant was by his residence in Baltimore, at the date of the note, his continuance there sometime after, his non-removal of his sign from his place of business, etc., precluded from insisting on being regarded as a non-resident indorser, the appellees having had no knowledge of his removal, and every reason to regard him as still living in the city.

Conceding the force of this argument, the appellant replies, that the appellees did not use due means to notify him as indorser, assuming that they had reason to believe the defendant continued to reside in the city.

The true question before us is, did the appellees use due diligence, under the circumstances of this case, to notify the appellant of the

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demand of payment and refusal by the makers, so as to bind the appellant as indorser.

The law does not require actual notice, but due diligence to give notice. The rule is laid down by Story in his work on Promissory Notes, to this effect :

“ In many cases, where the actual residence of the party entitled to notice cannot, after reasonable inquiries, be ascertained, it may perhaps be sufficient to direct the letter of notice to the place where the note bears date, or to the place where the indorser was residing at the time of his indorsement, if no change of residence is known, or to the place where the agent or other party procuring the discount at the time states the indorser resides ; or even to a place where the indorser does not reside, if another party to the note, upon inquiry, states that to be his residence. *A fortiori*, if upon diligent inquiries information is obtained of the residence of the indorser in a place where he does not actually reside, and the notice is directed accordingly to that place, it will be sufficient to bind the indorser,” etc.

“ Where an indorser of the note points out a particular place to which notice shall be sent to him, it will be sufficient that the notice be sent to him at that place, although it may not be his domicile or place of business. * * * * Thus where an indorser, living in Auburn, wrote after his name ‘ Auburn P. O.,’ a notice left at the post-office in that place was held sufficient ; although otherwise it would have been necessary to have given personal notice.” Story Prom. Notes (6 ed.), § 344 ; *Baker v. Morris*, 25 Barb. 138.

The evidence in this case shows, that the appellant, the indorser, at the time of the date and indorsement of the note, resided in Baltimore, having a well-known stand, and sign designating his place of business, and his name and residence in the city directory.

A few months afterward, before the maturity of the note, he removed from the stand, into the country, leaving his sign standing, and a tenant in possession, to whom his address was known, and returned weekly to his former place of business, where he received letters, although his post-office was “ Greenwood, Baltimore county.”

“ As a general rule, where the indorser and the party required to give him notice reside in the same town or city, the notice must be given him personally or at his domicile or place of business, and

notice at the post-office will not be sufficient unless shown to have actually reached him." *Waters v. Brown*, 15 Md. 285; *Bell v. Hagerstown Bk.*, 7 Gill, 223.

"This rule is qualified by the usage of large commercial towns, where, it is said, the uniform practice is to reach the party to be affected with notice through the post-office, when both reside within the limits of the penny post, but it must be shown in those cases that the notice has been delivered in time to reach the indorser before the expiration of the day following the dishonor." *Id.*

This court, in *Whitridge v. Rider*, 22 Md. 548, reiterated the well-established commercial canon, "that if the holder of a promissory note does not know where the indorser or other party to be notified lives, but can inform himself by reasonable endeavors or diligent inquiry, he must do so. An indorser is entitled to strict notice, by which is meant that reasonable diligence shall be employed and reasonable efforts made to give it. The diligence employed should be such as men of business usually exercise when their interest depends upon obtaining correct information."

The Supreme Court of the United States, in the case of the *Bank of Columbia v. Lawrence*, said: "The general rule is that the party whose duty it is to give notice in such cases is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary mode of conveyance, and whether the notice reaches the party or not, the holder has done all the law requires of him." 1 Pet. 578.

"It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law." *Id.*

It is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, etc. *Bk. of U. S. v. Carneal*, 2 Pet. 543.

The appellant, being a resident of the city of Baltimore (the place of the execution and of the date of the note), at the time of its execution and date, and continuing to reside there some time afterward, and retaining his sign at his place of business and his name in the city directory, in the absence of proof of knowledge to the contrary on the part of the holders, may reasonably have been presumed by the notary to be still a resident of the city, and treated

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as such in giving him notice. It was ruled by this court, and in *Sasscer v. Whitely*, 10 Md. 98, that where a note is dated at a particular place, and no other place designated as that of its negotiation and payment, the presumption is that the maker resides where the note is dated, and that he contemplated payment at that place. The reason of the rule applies as well to the indorser as the maker, as regards notice of demand and refusal.

The evidence of the appellees, showing the exercise of due diligence in giving notice of demand and refusal to the appellant, he was not prejudiced by admitting the portion of the protest excepted to, and therefore the error of the court below in admitting it is no ground of reversal.

Though the prayer, which is the subject of the second bill of exceptions, may have been intended as a demurrer to the evidence upon the issue joined on the third plea, yet as it contains no special reference to the failure of evidence on that, or the other issues, and is a general denial of the plaintiff's right to recover, without pointing out any particular error or omission in the proof, or raising any definite question as to its sufficiency, it was properly refused. *Dorsey v. Harris Adm'rs*, 22 Md. 85.

Judgment affirmed.

COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY V. DUVALL.

(54 Md. 350.)

Municipal corporation — negligence — injury during repair of highway — respondeat superior.

County commissioners are not liable for an injury sustained by a traveller on one of the county highways by the negligence of a laborer engaged in the repairing of the road upon the employment of the road supervisor, an independent officer appointed in pursuance of law.

ACTION of damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

S. Thomas McCullough and William H. Tuck, for appellant.

Richard J. Gittings and Frank H. Stockett, for appellee.

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BRENT, J. On the 26th of August, 1878, the appellee, in passing along one of the public roads in Anne Arundel county at a point where it was being repaired under the direction of the road supervisor, was struck and injured by a tree rolling over from a bank outside the road and elevated about twelve feet above the level of the road-bed.

The tree was cut down by two of the hands engaged in making the repairs, for the purpose of being used to fill up a wash in the road. A high wind was prevailing at the time, and as the tree was felled it was whirled over for several yards in a direction after the appellee, who had passed by the point where it stood, and the "butt-end," striking upon his rockaway and crushing it, inflicted upon him considerable personal injury.

The proof is quite sufficient to establish a want of proper care on the part of those engaged in the work. The accident seems to have resulted from their negligence and not in any way to have been attributable to the fault or contributory negligence of the appellee.

The third and tenth prayers of the appellants, which were rejected by the Circuit Court, raise the question of the liability of the county commissioners of Anne Arundel county, upon the assumption that the act complained of was negligent, and upon that question will depend the reversal or affirmance of the judgment which was obtained by the appellee.

The cases of *Duckett*, 20 Md. 468, *Gibson*, 36 id. 229 and *Baker*, 44 id. 1, are relied upon on the part of the appellee as conclusively settling this case. In all those cases the injuries for which the county commissioners were held liable resulted directly from the bad condition of the public roads or bridges. The county commissioners are specially charged by law with the duty of keeping these in good repair and safe for the travel of the public. *Tyson's case*, 28 Md. 310; *Walter's case*, 35 id. 394, and cases above cited. If they fail to do so and injury results, they are liable in an action at law, not by virtue of any liability at common law but because they are made so by statute. They are not permitted to excuse themselves by the fact that the road supervisor is also required by law to keep the public road in repair and may be made liable in a penalty or in damages for a failure to do so. Their obligation is a paramount and pre-existing one, and cannot be discharged by the failure of another to do that which they, the commissioners, are required by law to do. This principle is recognized and applied in the case

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of the *Mayor and City Council of Baltimore v. O'Donnell*, 53 Md. 110; s. c., 36 Am. Rep. 395. And it is the principle lying at the foundation of the cases relied upon by the appellee. Had the injury here resulted directly from the bad and neglected condition of the public road there would be no doubt of the appellee's right to maintain his action.

But quite a different question arises. The injury here complained of is not the direct result of a failure to keep the road in proper repair, but is occasioned by a collateral act done by those engaged in repairing it. The responsibility of the commissioners, if it exists at all, must depend upon the doctrine of *respondeat superior*.

This latter doctrine was very fully examined in a late case before this court. In *Deford's* case, 30 Md. 179, the leading authorities are reviewed and this court, speaking through Judge ALVEY, says on page 203, "And taking the latter decisions as enunciating the proper distinctions upon the subject, it results from them that the rule *respondeat superior* does not apply where the party employed to do the work, in the course of which the injury occurs, is a contractor pursuing an independent employment, and by the terms of the contract is free to exercise his own judgment and discretion as to the means and assistants that he may think proper to employ about the work, exclusive of the control and direction in this respect of the party for whom the work is being done. In such case the workmen employed by the contractor are his servants, and he is liable for any unskilfulness or negligence in the course of their employment, and not the party engaging the contractor to do the work."

The work which was in progress upon the public road at the time of the injury to the appellee was under the direction of the road supervisor. His office was created and his duties are fixed by a local law for Anne Arundel county — the Act of 1876, ch. 354. He receives his appointment from the commissioners, but secs. 4, 5 and 6 specially designate his duties and powers in the repairing of roads and bridges. Among other things, he is clothed with the duty of hiring hands and teams. The commissioners are required "to fix and regulate, from time to time, the prices to be paid by supervisors for the hire of necessary teams and laborers to execute any work under this law," but they do not contract with the laborer, or employ his services, or direct what particular laborer or team is to be employed. All this is done by the supervisor, not in obedience to

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any regulations and directions from the commissioners, except as to the price to be paid, but in the discharge of a duty imposed upon him by law. It is difficult therefore to see how under the authority of *Deford's* case, it is possible that the laborers employed by the supervisor to work upon the public road are to be considered the servants of the county commissioners, and not the servants of the supervisor.

In Wood on Law of Master and Servant, § 458, this doctrine is concisely stated. The author says, "The corporation is not responsible for the acts of its officers in the discharge of the duties imposed upon them by law, except where the duty is purely ministerial. Where the powers or duties of an officer are conferred or defined by law, he is a public officer, but where the powers are conferred or the duties defined by the corporation itself, the officer is a mere servant or agent, and the corporation is chargeable for the consequences of his acts within the scope of his authority." And this principle will be found running through all the cases where such a question has arisen.

In the case of *Ball v. Town of Winchester*, 25 N. H. 440, it is said, "The surveyor of highways, in performing his official duties, is not the agent of the town, but a public officer, clothed with such powers, and burdened with such duties as the law prescribes. His authority is not derived from the town, nor is he under their control, and he cannot in any proper sense be said to act for or in behalf of the town. His powers in reference to the repairing of highways cannot be enlarged nor abridged by any action of the town upon that subject, and what he does or declines to do in the rightful exercise of his authority is done or withheld because the law enjoins it upon him, and not because he is to act or refrain from acting in obedience to the injunction of the town." See also *White v. Inhabitants of Phillipstown*, 10 Met. 110; *Russell v. Mayor of New York*, 2 Denio, 461.

In *Walcott v. Swampscott*, 1 Allen, 101, the facts are not unlike those in the case before us. There the court decided that the town was not liable in damages for an injury sustained by the carelessness of a laborer employed by a highway surveyor in repairing a highway.

And so in *Barney v. City of Lowell*, 98 Mass. 570, where the injury was occasioned by a wagon carelessly driven by the teamster employed by the superintendent to haul stone for the repair of the highway.

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These cases were decided upon the ground that the relation of master and servant did not exist with the town or corporation, and the maxim *respondeat superior* did not apply. 98 Mass. 571. The surveyor or superintendent of the repairs was treated as a public officer with duties defined by law, and not as the agent of the town in the performance of duties defined by them.

This is precisely the condition of the present case. The road supervisor has his duties defined by law. In the discharge of those duties he is a public officer and not the mere agent of the commissioners. The laborers employed upon the highway were employed by him under authority derived from the law and not from the commissioners.

This made them his servants, and not the servants of the commissioners, "and he is liable for any negligence or unskilfulness in the course of their employment," and not the county commissioners. *Deford's case*, 30 Md. 203.

The law seems to be clear that the appellee, upon the fact in this case, has no right of action against the county commissioners of Anne Arundel county.

The judgment will therefore be reversed, without directing a new trial.

Judgment reversed.

SCHERMER V. NEURATH.

(54 Md. 491.)

Bailment — gratuitous — negligence.

S., a guest of N., deposited with N. for safe-keeping, without reward or profit, several United States coupon bonds of the aggregate value of \$4,500. These bonds, with the knowledge and consent of S., N. deposited in a box where he kept his own valuables, which he locked and placed in the drawer of a bureau in his bed-room, which drawer he also locked. N., without the knowledge or consent of S., took one of the bonds and hypothecated it as security for a debt upon which he was liable. Thereafter a thief entered the house of N., broke the lock of the drawer and that of the box, and stole the bonds of S. and the papers of N. therefrom. *Held*, that N. was not liable to S. for the bonds taken by the thief.

ACTION for value of bonds. The opinion states the case. The plaintiff had judgment below.

Albert Ritchie and John C. King, for appellant.

Arthur Geo. Brown and I. Nevett Steele, for appellee.

ROBINSON, J. This is an action by the appellant to recover the value of four United States coupon bonds of the value of \$1,000 each and one bond of the value of \$500, which were left with the appellee for safe-keeping, and which were afterward stolen by a female thief, known as Mary Miller.

The evidence shows that after an absence of several years in Europe the plaintiff returned to Baltimore in October, 1875, and stopped at the house of the defendant, his brother-in-law. He had on his person at the time the bonds in question, inclosed in an envelope, and the envelope in his pocket-book. Being about to retire to his bedroom, he asked the defendant whether he should take the bonds with him, to which the defendant replied "that he thought it would be safer to leave them with him." Whereupon the plaintiff handed the bonds to the defendant, and the latter in the presence of the plaintiff put them in a small wooden box, in which he kept his valuable papers, and locked the box, and put the box in a bureau drawer in his bed-room and locked the drawer.

The defendant's house is at the corner of Park and Fayette streets, and the first floor on both streets is occupied by stores and shops, one of them being the defendant's shoe shop. The second floor was occupied by the defendant and used for a parlor, dining-room and kitchen, and the third story for bed-rooms. The main entrance was on Park street.

The plaintiff remained as a guest in the defendant's house for about two weeks, and being about to go to North Carolina on a visit, he asked the defendant for his bonds; but upon the suggestion by the latter that it was safer to let them alone, he consented to let them remain. On the same day he took from defendant a receipt describing the numbers and amounts of each bond, and stating that they were left by plaintiff with defendant for safe-keeping.

After his return from North Carolina the plaintiff went to defendant's house for the purpose of cutting off the coupons then due. They went up stairs together and the defendant unlocked the bureau drawer, took out the small box, unlocked it and handed the bonds to the plaintiff. The coupons were cut off by the latter and in his presence the defendant again placed the bonds in the box and

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locked it, and put the box in the bureau drawer and then locked the drawer.

The plaintiff continued to reside in Baltimore but nothing more was said about the bonds until April following, when it was discovered that they, together with defendant's papers and jewelry, had been stolen.

Mary Miller, the thief, in her testimony fully explains the manner in which they were stolen. She says: "About ten o'clock in the morning she left the house where she was staying and walked around the city. About five or six o'clock she passed the house of the defendant, went up stairs and found all the doors up stairs open. Went first into the front room and found the bureau drawers open, then went into the adjoining room and found the second drawer of the bureau in that room locked. She broke the lock, and took out the small box and broke the lock of the box, and took out the plaintiff's bonds and defendant's papers. She then went into the front room and took three watches and some jewelry, and then left the house without seeing any one."

It appears also that sometime before the theft by Mary Miller, the defendant, without the knowledge of the plaintiff, deposited the \$500 bond with Wilson, Colston & Co. as collateral security for money borrowed. He subsequently however paid to the plaintiff \$526.25, the amount due on the face of the bond with interest to date.

The declaration contains three counts, one for trover and two for negligence.

In granting the defendant's and in refusing to grant the plaintiff's prayers the court substantially instructed the jury that the plaintiff had offered no evidence legally sufficient to entitle him to recover under either count in the declaration.

After a careful examination of all the evidence offered by the plaintiff, we are obliged to say that in our judgment it was not legally sufficient to warrant a jury reasonably to find either that the bonds were lost by the actionable negligence of the defendant or that they had been converted to his own use.

The proof shows that the bonds were left with the defendant for safe-keeping without any reward or profit, and that he agreed to take care of them solely for the accommodation of the plaintiff; that he put them in a box in which he kept his own valuable papers, and put the box in the bureau drawer in his bed-room, and that

both box and drawer were locked ; that this was done with the knowledge and consent of the plaintiff, and that they remained there with his consent. Under these circumstances the plaintiff cannot reasonably say there was any negligence in regard to the place in which the bonds were kept. If this be so there is no evidence to show that they were subsequently lost by any wrongful act or fault of the defendant. He was not required, of course, to keep the doors of the chamber rooms in the third story locked in the daytime, much less could he be required to keep watch against such a bold and daring theft as this.

There is a well recognized distinction in regard to the care and diligence required of a bailee for hire and one who undertakes to keep property without reward and solely for the accommodation of another. In regard to the former the liability is one founded on contract, and the bailee is obliged to exercise that care and diligence which is ordinarily exercised by persons in regard to the business or thing committed to his care; or as put in some of the cases defining the liability of a paid agent, he is responsible for the consequences of the "want of ordinary diligence," or which is the same thing, for "ordinary negligence."

In the case of a bailee without reward there is no contract and he is liable only for wrongful conduct, or according to the expression used in many cases, gross negligence.

So long ago as the celebrated case of *Coggs v. Bernard*, 2 Ld. Raym. 909, HOLT, C. J., held, that a merely gratuitous bailee or other agent was liable only for gross negligence. See also *Shiells v. Blackburne*, 1 H. Bl. 158. The terms "gross and slight negligence," have, it is true, been the subject of some criticism of late, on the ground of not being legal terms, and not importing a precise and definite idea of actionable negligence, for which a bailee may be liable. And in *Wilson v. Brett*, 11 M. & W. 115, Baron ROLFE said, he "could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet."

But be this as it may, in *Maury v. Coyle*, 34 Md. 235, this court has laid down in explicit terms what seems to us the most satisfactory rule or test, by which the liability of unpaid bailees is to be determined, namely, that he is bound to observe such care in the custody of property committed to his keeping, as persons of ordinary prudence in his situation and business usually bestow in the custody and keeping of like property belonging to themselves.

Want of ordinary diligence is of course as a general rule a question for the jury. But where the proof offered by the plaintiff is wholly insufficient to justify a jury reasonably to find the want of such ordinary diligence, it is within the province of the court to so instruct the jury. And as we have heretofore said, the proof in this case being legally insufficient to prove actionable negligence on the part of the defendant, the rulings of the court in this respect must be affirmed.

The only remaining question is whether there is any evidence to support the count in trover. And in support of this count, it was argued that the conversion by the defendant to his own use of the bond for \$500, was in law a conversion of the other four bonds of \$1000 each. The argument then goes so far as this, that when a half dozen articles, separate, and independent of each other, are delivered at the same time to a bailee, the conversion of one is the conversion of the whole, and this too, although the bailee was able and willing upon demand to return the other articles or property not taken.

We must confess we do not exactly see upon what principle this contention can be supported. Cases may be supposed, it is true, in which the conversion of part of a thing would be in law the conversion of the whole, provided the part so converted affected the whole. But to say that because the defendant took one bond and converted it to his own use, this worked a conversion of the remaining bonds, would be to allow a fiction to prevail against the truth.

Nor do we find that any of the cases cited by the plaintiff sustain this position. In *Richardson v. Atkinson*, 1 Str. 576, where part of the liquor was drawn off, it was held to be a conversion of the whole, because the defendant had filled the vessel with water.

But in *Philpott v. Kelly*, 3 Ad. & El. 106, where a pipe of wine was left with the bailee for safe-keeping, and he caused part of the wine to be drawn off, and then used part of it after it was bottled, it was expressly held, that this did not constitute a conversion of the whole.

The use of the \$500 bond by the defendant was of course a breach of faith, and for its conversion he was unquestionably liable under the count in trover, but the conversion of this bond was neither in law nor in fact a conversion of the other bonds which remained untouched in the place where they were deposited.

The evidence offered in the first bill of exceptions, as to the declarations of the defendant made a few days after the theft, to the effect that he considered himself responsible to the plaintiff for the loss of the bonds, was also properly rejected. His opinion or belief in regard to his liability did not affect it the one way or the other. Such declarations were inadmissible to prove negligence, because they state no facts from which negligence could properly be inferred.

Finding no error in the rulings below, the judgment will be affirmed.

Judgment affirmed.

RHIND V. HYNDMAN.

(54 Md. 527.)

Contract — joint — demand for performance — limitation.

Where the performance of a joint contract, not of a partnership, nor a negotiable instrument, depends on demand, a demand on one of the contractors is sufficient.

The cause of action accrues on demand.

ACTION on contract. The opinion states the case. The defendants had judgment below.

John S. McCleave and A. Hunter Boyd, for appellant.

J. H. Gordon, for appellees.

BARTOL, C. J. This suit was brought by the appellant against the appellees on the 19th day of June, 1879. The contract sued on is alleged in the declaration to have been made with the appellant, by the appellees jointly, on the 29th day of March, 1875, whereby the appellees agreed, for the consideration therein stated, to transfer to the appellant on or after the 15th day of October, 1875, shares of stock of the Empire Coal Company of Allegany county, sufficient to amount to \$500, at the market price of said stock, when the transfer should be demanded.

The declaration in the first and third counts alleged a demand for the transfer of the stock, made upon Hyndman, one of the

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appellees, on the 11th day of July, 1878. The demurrer to these counts was sustained.

The sixth plea of the appellees alleges "that the said stock was demandable by the said plaintiff immediately after the fifteenth day of October, 1875, and it was the duty of the plaintiff to demand the same within a reasonable time after said fifteenth day of October, and more than three years expired after the end of such reasonable time for making said demand, and before the bringing of this suit."

To this plea the appellant demurred, the demurrer was overruled, and judgment being entered for the defendants, the plaintiff has appealed.

Two questions are presented for our decision :

1st. Is a demand made upon one of several joint contractors, not partners, for the performance of a contract to be performed on demand, sufficient to bind all the joint contractors, the joint contract not being a negotiable instrument ?

2d. From what time does the statute of limitations begin to run, against an action upon a contract not negotiable, to be performed on demand ?

1st. Where joint contractors are partners, it is well settled that a demand on one is sufficient to bind all. Where no such partnership exists, but the parties are jointly bound, a distinction has been made between negotiable instruments and joint contracts not negotiable.

With respect to the former, many cases have been cited by the appellees showing that in order to bind the indorsers, a demand must be made upon each one of the joint drawers, and that a demand on one is not sufficient ; and in the same manner where there are joint indorsers, not partners, notice of dishonor must be given to each. On this subject the authorities nearly all concur ; the case of *Harris v. Clark*, 10 Ohio, 5, where the contrary was held, may be considered exceptional.

The reasons for the rule are very well stated by SWIFT, C. J., and GODDARD, J., *Shepard v. Hawley*, 1 Conn. 367 (6 Am. Dec. 244). The reasons which govern the liability of parties upon negotiable paper have not been held applicable to joint contracts, which are not within the law merchant.

In Chitty's Pl. (16th Am. ed.) 340, note, it is said : "Where a previous demand is necessary to maintain a suit against two joint

promisors, it is sufficient to aver a demand on one." For this are cited *Griswold v. Plumb*, 13 Mass. 298, and *McFarland v. Crary*, 8 Cow. 253.

In *McFarland v. Crary* the joint contractors were partners ; it is therefore inapplicable. But in *Griswold v. Plumb* the point was distinctly decided. There two persons became bailees of goods, to be delivered on demand, and it was held that a demand on one was sufficient, their undertaking being joint. The law is stated in the same way in 1 Wait on Actions and Defenses, 395. In *Holbrook v. Holbrook*, 15 Me. 9, it was held, "If two are jointly liable, a demand made upon or notice given to one is equally binding on both."

In 3 Comyn Dig. L., p. 120, it is laid down "that if several are bound by obligation, covenant, etc., to do an act upon notice to them, notice to one is sufficient." *Terry v. Reding*, Moore, 555.

In *Whitcomb v. Whiting*, 2 Doug. 652, it was decided that part payment by one of several joint promisors on a note was good to remove the bar of the statute against all the joint contractors.

That decision was followed by *Perham v. Raynal*, 2 Bing. 306, and *Burleigh v. Scott*, 8 B. & Cres. 36. And Mr. Greenleaf says, though sometimes questioned, seems now firmly established. 1 Greenl. Ev., § 174, note.*

In *Ellicott v. Nichols*, 7 Gill, 104, the court say, in speaking of *Whitcomb v. Whiting*, "The promisors were subjected to a joint and common responsibility ; under such circumstances, it might well be maintained, that a payment made by one of the parties to the note, was a payment made for the benefit of all." And on page 106, referring to the same case, the court say, "because at the time of the payment, the parties were jointly liable for the debt, and one might therefore be considered as the agent of the other with respect to the debt." This reasoning seems to us to apply to the point under consideration.

For many purposes the law treats joint contractors as one person. A release to one is a release to all ; when jointly interested in the contract, one cannot sue without the others ; nor can one be sued without the others ; and we think, both upon reason and authority, a demand on one was a demand on all. It follows that it was error to sustain the demurrer to the first and third counts of the declaration.

* See *Burgoon v. Bixler*, post, and note.

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2d. To determine the second question, we must refer to the language of the statute. This provides that "the action shall be commenced or sued within three years from the time the cause of action accrues." 1 Code, art. 57, § 1. The contract sued on in this case was to be performed "on or after the 15th day of October, 1875, when the same should be demanded." The cause of action therefore did not accrue until demand was made. According to the terms of the statute, limitation would begin to run from that time. This has been repeatedly decided.

In *Holmes v. Harrison*, 2 Taunt. 323, in the King's Bench, the note sued on was payable after sight; it was held that suit was not barred till six years after it had been presented for payment. A similar decision was made in *Topham v. Bradick*, 1 Taunt. 571, in the Common Pleas.

These decisions were followed by *Thorpe v. Combe*, 8 Dow. & Ry. 347, where the note, dated in 1810, was payable two years after demand. It appeared that demand was made on the 18th day of June, 1823. BAYLEY, J., said, "I am clearly of opinion that the statute of limitations did not begin to run until two years after demand of payment of this note had been made. Here the cause of action did not arise until the two years after demand had elapsed, and consequently the statute affords the defendant no protection." The other judges concurred.

The doctrine of *Holmes v. Harrison*, has been often recognized in this country. *Stanton v. Est. of Stanton*, 37 Vt. 411; *Thrall v. Mead*, 40 id. 540; *Little v. Blunt*, 9 Pick. 49; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267 (26 Am. Dec. 464); *Wolfe v. Whiteman*, 4 Harr. 246. Other cases might be cited.

In *Fells' Point Savings Institution v. Weedon*, 18 Md. 326, on a certificate of deposit payable on demand, it was said "the statute began to run when demand was made."

In support of a different doctrine, the counsel for appellees have cited several cases, in which it has been held that where the contract is to be performed on demand, if the demand be unnecessarily delayed beyond the time limited by the statute, the action will be barred.

Thus in *Pittsburg & Connellsville R. R. Co. v. Byers*, 32 Penn. St. 22, which was a suit to recover upon a subscription to stock, the court said, although the statute of limitations does not begin to run against a subscription to the stock of a railroad company

till after calls are made for installments, yet when no call is made for more than six years from the date of the subscription, the law will presume an abandonment of the enterprise, and from analogy to the statute, bar the recovery. So in *Morrison v. Mullin*, 34 Penn. St. 12, it was decided that "where a demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay." That decision was followed and approved in *Palmer v. Palmer*, 36 Mich. 487; s. c., 24 Am. Rep. 605.

The cases in Pennsylvania and Michigan were not strictly decisions at law on the construction of the statute; they were decided by courts exercising equitable jurisdiction, and consequently stand upon different grounds. Like *Codman v. Rogers*, 10 Pick. 112, and *Little v. Blunt*, 9 id. 490, cited by the appellees, where the equitable doctrine of *laches* was applied. In *Little v. Blunt*, the legal rule was recognized. The court say: "But if the promise had been of a collateral thing, which would create no debt until demand, it might be otherwise. It is clear that where no action will lie without a previous demand * * * in all such cases, no cause of action accrues until after demand made, and the statute of limitations will begin to run from the time of the demand, and not from the time of the promise. This distinction is obvious and will reconcile all the cases."

It follows from what we have said that in our judgment the sixth plea was not good, and the demurrer thereto ought to have been sustained.

Judgment reversed, and new trial ordered.

SHAEFFER V. SHAEFFER.

(34 Md. 679.)

Executor and administrator — funeral expenses.

Horse feed and dinners furnished to persons attending a funeral, without the request of the executor or administrator, are not proper funeral expenses to be paid out of the estate, and cannot be made so by neighborhood usage.

ACTION for funeral expenses. The opinion states the case. The plaintiff had judgment below.

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William P. Maulsby, for appellant.

Johns E. Smith and *William E. McKelup*, for appellee.

ALVEY, J. This action was brought against the defendant in his representative character of executor, and the claim sought to be recovered is for work, services and board furnished the deceased in his life-time, and for things charged as funeral expenses. The case was tried on the general issue, plea of non-assumpsit.

[Minor point omitted.]

The principal subject of controversy on this appeal is the claim of the plaintiff for \$100 charged in his account as for funeral and other expenses. As we have stated, the action is against the defendant in his representative character as executor, and the proof on the part of the plaintiff shows that the charge in his account of \$100, as for funeral and other expenses, was for dinner and horse feed, furnished at the house of the plaintiff on the day of the burial of the deceased but after the funeral had taken place, to persons who had attended the funeral. The deceased had lived for a considerable time with the plaintiff and died in the house of the latter. On the day of the funeral the body was taken to a church some five miles distant for interment, and after the funeral services were over and the body buried, the plaintiff caused an invitation to be given to those present to repair to his house for dinner; and the proof shows that some seventy or eighty persons accepted the invitation and dined with the plaintiff, and that twenty-five or thirty horses of parties so dining were also fed by the plaintiff. It now here appears that this entertainment was provided at the instance or request of the defendant; but it seems to have been the unsolicited and voluntary act of the plaintiff. The charge is sought to be maintained by what is said to be a custom in the neighborhood.

By the Code, art. 93, § 5, as modified by the Act of 1874, chap. 155, it is provided that funeral expenses shall be allowed at the discretion of the Orphans' Court according to the condition and circumstances of the deceased. And as has been very properly said, no precise sum can be fixed to govern in all cases. It will vary in every instance, not only with the station in life of each particular decedent but also with the price of the requisite articles at the particular place; and it must also vary with respect to the circumstances and extent of the decedent's estate. 2 Wms. Ex'rs, 831. For

while a particular allowance for funeral expenses out of an estate ample to pay debts and legacies might be regarded as in all respects reasonable and proper, such an allowance might be far otherwise as against creditors of an insolvent estate. Hence the allowance is placed at the discretion of the Orphans' Court, supposing that that court would exercise a sound and rational discretion with reference to the circumstance of each particular case. The plaintiff's claim was laid before the Orphans' Court and that court declared that the account would pass when paid; but that order has no effect to establish the validity of the claim as against the opposition of the executor. He is entirely at liberty to contest the claim, and the plaintiff is required to prove it as if no such order had passed. Code, art. 93, §§ 100, 101. The whole import of the order is that if the executor should think proper to pay the claim he would be entitled to receive credit therefor in his account.

But is the charge for dinner and horse feed furnished to persons who had attended the funeral of the deceased a proper and legitimate charge as part of the funeral expenses? Clearly, we think not. Nor can the claim be aided or controlled in any manner by neighborhood custom. If custom could enter into the matter, and shape the claim of the plaintiff, that custom, if allowed to be uniform in its operation, would to a large extent control the discretion of the Orphans' Court, without respect to the condition and circumstances of the deceased. If custom could authorize the giving of funeral dinners at the expense of the estate of the deceased, the allowance therefor would be proper, whether the estate proved to be solvent or insolvent, or whether the number of persons attending them be eighty or five hundred, or even more. Such entertainments are not the ordinary, and certainly not the necessary, incidents of funerals, nor are they within the contemplation of the law which provides for the allowance of reasonable funeral expenses, having reference to the condition and circumstances of the deceased. Those who think proper to furnish such entertainments must do so from motives of hospitality, and not with design of charging the estate of the deceased.

There is no evidence or pretense that the dinner and horse feed were furnished at the special instance and request of the defendant; but if such had been the case, there could be no recovery in this action against the defendant in his representative character. In such case, recovery could only be had against the defendant person-

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ally. *Curtis's Ex'rs v. Bank of Somerset*, 7 H. & J. 25; *Corner v. Shew*, 3 M. & W. 350, 356; 2 Wms. Ex'rs, 1525.

It follows from what we have said, that the court below was in error in granting the first and second prayers offered by the plaintiff, and in rejecting the first, second, third, fourth, fifth, fourteenth, fifteenth, sixteenth and seventeenth prayers offered by the defendant. Of these prayers, those on the part of the plaintiff affirm the right to recover for the dinner and horse feed, and those on the part of the defendant deny such right. We think the court below was right in rejecting all the rest of the defendant's prayers, some because they were misleading, and others for the want of evidence upon which to found them. The judgment will therefore be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded.

SMITH V. THOMPSON.

(55 Md. 5)

Burial — exclusive right of — disturbance of — measure of damages.

The plaintiff, as a member of a society, acquired an exclusive right of burial in a certain lot so long as the ground should remain a cemetery. The defendant, without his consent, buried a child in that lot. *Held*, that an action of trespass *quare clausum fregit* would lie, although the plaintiff had withdrawn from the society.

The defendant's conduct being malicious, punitive damages were proper.

ACTION of trespass *quare clausum fregit*. The opinion states the case. The plaintiff had judgment below.

Edward Y. Goldsborough and Charles W. Ross, for appellant.

William Ritchie and John Ritchie, for appellee.

MILLER, J. This is an action of trespass *quare clausum fregit* brought by the appellee against the appellant for breaking and entering the plaintiff's burial lot, No. 19, in "The Laboring Sons' Cemetery." The trespass complained of is that the defendant in June, 1879, dug a grave in this lot and buried there the corpse of a

child, without the plaintiff's permission or consent. The facts to be first stated are substantially as follows:

In 1839 an unincorporated voluntary association of colored men was formed under the name of "The Beneficial Society of Laboring Sons of Frederick." In 1851 or 1852 this society purchased a lot of ground in Frederick city from Ezra Houck. In the latter year, about one-fourth of this ground was, by order of the society, laid off into sixty burial lots, of twelve by sixteen feet each, and each of these lots was marked and indicated by four corner posts of white marble, with the respective numbers marked on the stones, which are still there and plainly visible. To each full member who had, at that date, paid up all his dues and fees, one of these burial lots was assigned. A plat was also made of the whole, on which was indicated the individual owner of each lot, according to the allotment and division then made, and lot No. 19 was thus assigned to the plaintiff, who had become a member of the society in 1846 or 1847, and had then paid up his dues in full. In August, 1854, a deed was executed by Houck, in lieu of one which had been previously executed, but which had been mislaid and lost before it was recorded, conveying the whole lot of ground to seven named parties, of whom the plaintiff was one, "and their heirs and assigns forever, in trust, that they, the survivors or survivor of them, and the heirs of such survivors or survivor, shall hold said property upon the trusts indicated and mentioned in the recital of this indenture." In the reciting part of the deed, after stating that the purchase money of \$265 had been paid in full, and that the parties of the second part "now constitute the trustees of said Laboring Sons' Society," it is recited that "said society has laid off a portion of said ground as a burial ground, and have desired and directed said trustees to sell the residue to the best advantage for the use of said society." All the trustees named as grantees in this deed are now dead except three, Bowen, Probee and the plaintiff. After this allotment and division the plaintiff took such possession of his lot as the purpose to which it was devoted admitted of. In 1858 he buried his aunt there, 1862 a relative of his wife, in the spring of 1864 his mother, and put up a tombstone for her and had the lot sodded, and in 1878 had this tombstone righted and repaired. It also appears that in 1861 a certificate was issued by order of the society to each of the parties to whom these lots had been so assigned, and the plaintiff received his, which is as follows:

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“LABORING SONS’ CEMETERY.”

This is to certify, that Nicholas Thompson is *the owner* of lot No. 19 in Laboring Sons’ Cemetery for which 10 dollars have been paid in full for said lot. In testimony whereof, the president of the trustees has hereunto affixed his hand and seal this 2d day of November in the year 1861.

“Robert E. Probee. [Seal.]”

“Test: Cyrus Bowen.”

About these facts there is no dispute, and if there was nothing else in the case, there can, we think, be little doubt as to the plaintiff’s right to maintain this action. The facts thus stated make a case where the trustees who held the legal title and were themselves members of the society, *cestui que trust*, unite with all the other members who were fully competent to act, each for himself in the premises, in setting apart a portion of this ground for burial purposes, and in a voluntary parol partition of that part into separate lots clearly defined and bounded, and in the assignment of these lots severally to individual members, as their respective separate burial places, and this is followed by the separate possession of the individual owners, and the grant of a certificate by the order of the society itself, stating that each member is the owner of the separate place so assigned to him, and for which he had paid the price agreed upon in full. By virtue of these acts and proceedings we think it clear the plaintiff acquired the privilege and right to make interments in this lot, to the *exclusion* of others, so long as the ground remained a burying ground or cemetery, and that for an invasion or disturbance of this right either by a member of the society or any one else he can maintain an action of trespass *quare clausum*. Looking to the peculiar nature of this privilege and knowing how highly it is esteemed, and how sacred it is held by mankind in all civilized communities, we should so decide were the question a new one; but we think the right to maintain the action under such circumstances is sustained by the decision of this court in *Partridge’s* case, 39 Md. 631, and by the decisions in *Kincaid’s Appeal*, 66 Penn. St. 411; s. c., 5 Am. Rep. 377; and *Meagher v. Driscoll*, 99 Mass. 281.

The next question is, had the right or privilege thus secured to the plaintiff been forfeited or lost at the time this action was

brought? It seems that in consequence of some disagreement among the members, the plaintiff and twenty others (the whole number of members being forty) in 1862 withdrew and formed another society called "The Workingmen's Society," and thereafter ceased to be members of the old society. The other nineteen members remained in and were subsequently incorporated by the Act of 1867, ch. 343, under the corporate name of "The Beneficial Society of the Laboring Sons of Frederick City." In October, 1863, after some dispute, an equal *pro rata* division of the money (\$655) then in the treasury of the old society was made among all the forty members, and the amount coming to the withdrawing members was paid to them or into the treasury of "The Workingmen's Society," and a receipt given therefor. It is argued that by this withdrawal and ceasing longer to be members of the society, the withdrawing members forfeited and lost all their interest and rights in these lots. But in our opinion such was not the necessary consequence of the mere act of withdrawing. It is true, it might have such effect if the parties intended it should, but it was clearly competent for them to withdraw and cease to have any interest in the future income and benefits of the society, and still retain their rights in the lots which they had secured and paid for at the time of the division and allotment in 1852. It was the purpose of the society, as stated in the deed from Houck, to sell the residue of the ground, that is, all save the portion laid off and allotted to the members in 1852, to the best advantage for the use of the society, and they proceeded to sell burial lots in this residue to other parties. Of course by withdrawing, these parties would cease to have any interest in the proceeds of these sales made after their withdrawal, and all other benefits pertaining to continuing membership, but it was quite consistent with this, and so far as we can see, perfectly lawful for them, if such was their intention, to retain their previously acquired, perfected and vested interests and privileges in these particular lots. A paper dated the 6th of October, 1863, was offered in evidence by the defendant, purporting to be signed by all the withdrawing members, including the plaintiff, in which they certify that "they have no more right or title, or interest in the aforesaid society, or interest in the benefit arising from the graveyard of the said society." Even if this language could be construed as manifesting a purpose on the part of the alleged signers to relinquish or abandon their rights in these

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lots, the court was perfectly right in rejecting the paper, because it was not only never signed by the plaintiff, but his name and the names of all the others, except Probec, were put to it by another party without any authority to do so. The plaintiff testifies not only that he never signed this paper and never authorized any one to sign it for him, but that when the settlement in October, 1863, was made, he never heard it contended that the withdrawing members gave up their lots. He continued afterward and ever since to assert an exclusive right to this lot. He buried his mother there in 1864, in the same year put up a tombstone, later on had the lot freshly sodded, as late as 1878 had the tombstone repaired, and when his right was invaded for the first time by the defendant, he promptly brought this action. Indeed, it is highly improbable these parties intended, by withdrawing, to revest their exclusive privileges in these lots in the society, and thus give the society the power to remove the bodies they had already buried in their lots. But however this may be, no question as to purpose or intent is before us nor was any such question left to the jury. The plaintiff offered no prayer on the question of right or title, and the defendant's prayers rest the defense solely on the bare facts of withdrawal, non-membership at the time of the trespass, and the subsequent incorporation of the society by the Act of 1867, ch. 343. In our opinion neither of these facts of itself nor in combination with the others constitutes a bar to this action.

The only prayer of the plaintiff that was granted relates to the question of damages and we find no error in it. It tells the jury they may consider the motive and manner with which the trespass complained of was done by the defendant, and though they may find he was instructed by the society, as their sexton, to bury on the lots of which the plaintiff's was one, they may nevertheless award punitive damages if they find he was not acting in good faith under such instruction, and from an honest belief in the right and authority of the society so to instruct him, but was in reality actuated by malice or ill-will towards the plaintiff or a wanton disregard or indifference to his rights. There was evidence from which the jury could have found the defendant was actuated by malice in committing this trespass, and it follows the court was right in rejecting the defendant's fourth prayer, which asserts that the verdict must be for nominal damages only.

What we have thus said disposes of all the rulings in the several exceptions. We find no error in any of them, and the judgment must be affirmed.

Judgment affirmed.

MUNSHOWER V. STATE.

(55 Md. 11.)

Evidence — almanac.

An almanac is admissible in evidence to prove the hour of moon-rise on a past night. (See note, p. 416.)

CONVICTION of murder. The opinion states the point.

James McSherry, for appellant.

Charles J. McGwinn, attorney-general, for appellee.

MILLER, J. [Omitting other matters.] It was conceded that it became material and competent for the State to prove at what hour the moon rose on the night of Saturday, the 9th of August, 1879, and for the purpose of proving this, the State offered in evidence Gruber's Almanac for the year 1879. The prisoner objected to its admissibility, but the court overruled the objection and allowed the almanac to be offered for the purpose stated. To this ruling the prisoner excepted.

This is all the exception states in regard to the almanac offered, and we must assume that it contained tables giving the periods of the rising and setting of the sun and moon on each day of the year, such as are usually found in such works. The prisoner did not propose to offer proof assailing or impeaching the accuracy of the astronomical calculations upon which the tables in the particular almanac in question were made, but his counsel contend that the almanac was not the best evidence, nor indeed any evidence as to when the moon rose on that night. The argument is, that it was a mere calculation made by some one long anterior to the happening of the event, that the event would occur at a certain hour and minute; it was not evidence that the moon had risen at a certain hour, but the

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statement of a conjecture that it would do so. On the 2d of January, 1880, when this case was on trial, there were certainly better and surer means of proving when the moon did actually rise on the 9th of August, 1879, than by relying on the computation of an almanac maker that it would or ought to rise at a given time that night. How is the fact that it did rise at a particular hour proved by tendering as evidence the conjecture or calculation of some one that it would do so? If Gruber's Almanac is evidence for this purpose, so then are all the other various ones published, because there is nothing in this one to make it more authentic than the others, and thus a fact susceptible of exact proof like any other event that has happened, may be established by the unsworn conjecture of almanac compilers. We do not propose to elaborate the question, nor to rely upon the fact that the statute of 24 Geo. 2, ch. 23, is in force in this State. As has been well argued by the attorney-general in his brief, the precise period at which the sun and moon will rise or set at any particular period of twenty-four hours in the future is as absolutely certain and just as capable of exact mathematical ascertainment as the occurrence of the day in which such setting or rising will take place. Courts have received as evidence weather reports, reports of the state of the markets, price currents, and insurance tables tending to show the probable duration of human life, though these are records which are not capable of mathematical demonstration, which cannot be tested by any certain law, and which may or may not omit the record of changes which have actually taken place. But an almanac forecasts with exact certainty planetary movements. We govern our daily life by reference to the computations which they contain. No oral evidence or proof which we could gather as to the hours of the rising or setting of the sun or moon could be as certain or accurate as that which we may obtain from such a source. Why then should not these computations, which are, after all, but parts of the ordinary computations of the calendar, be admitted as evidence? As was said by Judge COOLEY in considering an analogous question (*Sisson v. Railroad Co.*, 14 Mich. 497) "courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." There is clearly no error in the ruling in this exception.

Rulings affirmed and cause remanded.

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NOTE BY THE REPORTER. — In *State v. Morris*, 47 Conn. 179, a trial for burglary, for the purpose of showing that the offense was in the night, the State was permitted to introduce in evidence a copy of an almanac. The court said: "There is no error in this. The time of the rising or setting of the sun on any given day belongs to a class of facts, like the succession of the seasons, changes of the moon, days of the month and week, etc., of which courts will take judicial notice. The almanac in such cases is used, like the statute, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury." In *Tutton v. Darke*, 5 H. & N. 647, POLLOCK, C. B., said, *obiter*: "The almanac is part of the law of England. In *Regina v. Dyer*, 6 Mod. 41, it is stated that all the courts agreed it was; but it does not follow that all that is printed in every printed almanac is part of it, as for instance, the proper time of planting and sowing. Also in *Brough v. Perkins*, 6 Id. 81, it is said that the almanac is part of the law of England; but the almanac is to go by that which is annexed to the common prayer book. Looking at that, I find it says nothing about the rising or setting of the sun, and I rather think that any information on that subject is quite recent." So Taylor (Ev., 1230) says: "The hour at which the moon rose is a fact, and it can fairly be argued upon the general principles of the law of evidence, that the best evidence of that fact is the testimony of some one who observed its occurrence. Books of science are generally not evidence of the facts stated in them, although an expert may refresh his memory by their use." In *Collier v. Nokes*, 2 C. & K. 1012 the court held that although they would take judicial notice of days, they would not of hours, as of the hour of sunrise or sunset. In *Allman v. Owen*, 31 Ala. 167, it was held that courts will judicially take cognizance of the coincidence of days of the month with days of the week, as disclosed by the almanac.

Wharton says (Ev., § 282) that a judge "may refer to almanacs." So says Best. Now if the judge may turn to an almanac to satisfy himself when the sun set on a particular day, why may not the almanac be put in evidence to satisfy the jury of the same fact?

In *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 497, it was held, COOLEY, J., giving the opinion, that newspaper reports of the state of the markets are receivable in evidence. The learned judge remarked: "Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character. The reason in favor of the mathematical demonstrations recorded in the almanacs is much stronger than that in favor of the comparatively inexact and discordant reports of newspapers, dependent solely on hearsay."

In speaking of books of exact science, Wharton says (Ev., § 667): "The books containing such processes, if duly sworn to by the persons by whom they are made, are the best evidences that can be produced in that particular line. When the authors of such books cannot be reached, the next best authentication of the books is to show that they have been accepted as authoritative by those dealing in business with the particular subject."

In *Morris v. Harmer's Heirs*, 7 Pet. 559, it was held that although historical works are evidence of ancient occurrences, which do not presuppose the existence of better evidence, yet if the facts related by a historian are of recent date, and may fairly be presumed to be within the knowledge of many living persons, then the book is not the best evidence within the reach of the parties. But there is a great difference between matters of historical difference and mathematical certainty; between the accounts of the late civil war by Mr. Jefferson Davis or Mr. Pollard, on the one hand, and Gen. Badeau or Gen. Sherman on the other, and the tables of the tides, an almanac, or the multiplication tables. We agree with the annotator of the Maryland case in the *Criminal Law Magazine*, that "we govern our daily life by reference to the computations of the almanac, and these computations are more satisfactory to us than the computations of persons who have actually observed the events predicted by such computations. The world at large regards the statement of an almanac in regard to the hour of sunrise as more certain and satisfactory than the recollection of individuals. A rule which would exclude the evidence of an almanac is too narrow and technical to find favor in modern jurisprudence." It would be almost impossible, in a great majority of cases, to prove, by human testimony, the precise hour of the rising or setting of the sun or moon on any particular day a number of years, or perhaps even a few months ago. To ascertain an individual who happened to observe and note it, would be like hunting for a needle in a haystack.

Burgoon v. Bixler.

BURGOON V. BIXLER.

(55 Md. 384.)

Limitations — statute of — payment by joint debtor.

Payment of interest and admissions by a joint maker of a promissory note, before the statute of limitations has run against it, will prevent the running of the statute as to all the makers. (See note p. 418.)

ACTION on a promissory note. The opinion states the point. The plaintiff had judgment below.

D. N. Henning and W. P. Maulsby, for appellant.

C. B. Roberts, for appellee.

BARTOL, C. J. This suit was brought by the appellee upon the joint and several promissory note made by the appellant and Josephus H. Hoppe, since deceased, dated April 18, 1870, whereby they promised to pay to the appellee, ten months after date, \$900, with interest from date, for value received. The suit was brought on the 29th day of October, 1878.

The defendant pleaded : 1st, that he never promised as alleged, 2d, payment ; and 3d, the statute of limitations.

Issue was joined on the first and second pleas. To the third plea, the plaintiff filed seven replications. To the third, fourth, fifth and sixth of these the defendant demurred, and the demurrers were sustained ; no question therein arises upon this appeal.

Issue was joined on the first, second and seventh replications. The first relies upon an alleged payment by the defendant on account of interest on the note, within three years before the suit, to take the case out of the statute. The second relies upon an alleged payment by the defendant on account of the principal due on the note, made within three years before the suit. The seventh alleges a new promise by the defendant within three years before the suit.

The verdict and judgment being in favor of the plaintiff, the defendant appealed. In the course of the trial below four bills of exceptions were taken by the appellant, which will be disposed of in their order.

[Omitting other points.]

The second prayer, to take the case out of the statute, relied upon the payments of interest on the note, if the jury should find such payments, made by Josephus H. Hoppe in March, 1871, and April, 1874, and "that defendant on April 1, 1875 or 1876, or within a day or two before, or after said days, or either of them, paid or gave to said Hoppe \$54, as interest on account of the note, and that said Hoppe on the same day sent the said sum of \$54 to the plaintiff, as and for interest on said note, and that said Josephus on the 1st of April, 1876 or 1877, or within a day or two before or after said day, paid to the plaintiff any sum of money as principal or interest on the note."

The effect of part payment by one of two or more joint and several makers of a note, to prevent the bar of the statute was considered in *Ellicott v. Nichols*, 7 Gill, 86, and has recently been again considered in *Schindel v. Gates*, 46 Md. 604 ; s. c., 24 Am. Rep. 526. In these cases it was held as the settled law of this State, that such payment, if made before the statute has attached, is sufficient to take the note out of the operation of the statute as to all the makers, on the principle that the payment by one is payment for all. In such case the statute runs from the time of the last payment. If this be more than three years before the institution of the suit the statute operates as a bar. Now this prayer submits to the jury to find that the last payment made by Hoppe was in April, 1876 or 1877. If made either in April, 1876 or 1877, it was within three years before the institution of the suit, and would prevent the bar of the statute, provided the previous payments had been made, as stated in the prayer, as was decided in *Schindel v. Gates*, before cited. It was not error to grant the prayer.

[Other matters omitted.]

Judgment affirmed.

NOTE BY THE REPORTER.—In *National Bank of Delavan v. Cotton*, Wisconsin Supreme Court, Sept. 1881, the main question was one of fact as to whether a payment had actually been made, and the effect of payment by one joint debtor is regulated by statute in that State, but the court remarked that "In the absence of any statute to the contrary, payment by one joint debtor will remove the bar of the statute as to all, on the ground that each joint debtor is the agent of all the rest for making a payment which all are bound to make. This is the law by a clear weight of authority." In this case the payment was made before the bar of the statute had attached. The following recent cases may be consulted. *First*, holding that payment after the statute has run will not revive: *Mayberry v. Willoughby*, 5 Neb. 388 ; s. c., 25 Am. Rep. 491. *Second*, holding that payment after the statute has run will revive: *Mix v. Shattuck*, 50 Vt. 421 ; s. c., 28 Am. Rep. 511. *Third*, holding that payment before the statute has run will extend: *Beardsley v. Hall*, 36 Conn. 270 ; s. c., 4

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Am. Rep. 74; *Merritt v. Day*, 9 Vroom, 82; s. c. 20 Am. Rep. 362; *Green v. Greensborough Female College*, 83 N. C. 449; s. c., 85 Am. Rep. 579; *Nat. Bk. of Delavan v. Cotton*, Wis. 24 A. L. J. 451. *Fourth*, holding that payment before the statute has run will not extend: *Tate v. Clements*, 16 Fla. 339, s. c., 26 Am. Rep. 700; *Bush v. Stowell*, 71 Penn. St. 208; s. c., 10 Am. Rep. 694; *Knight v. Clements*, 45 Ala. 89; s. c., 6 Am. Rep. 698.

See also *Rhind v. Hyndman*, ante, and *Kallenbach v. Dickinson* ante, and *Cocke v. Hoffman*, post.

SEIM V. STATE.

(55 Md. 566.)

Criminal law — selling intoxicating liquors — social club.

The officers of a social club, whose steward furnishes the members with food and with beer by the glass, at a fixed price, to be consumed at the club, the money so received, being expended for the expenses of the club, are not guilty of "selling" beer within the meaning of an excise law.*

CONVICTION of selling beer on Sunday. The opinion states the case.

George C. Maund and *Wm. Pinkney Whyte*, for appellants.

Charles J. M. Gwinn, attorney-general, for appellee.

BARTOL, C. J. The appellants were indicted in the Criminal Court of Baltimore, under the provisions of Art. 30, § 179 of the Code, as amended and re-enacted by the Act of 1866, chap. 66. That act provides that "no person in this State shall sell, dispose of, barter, or if a dealer in any one or more of the articles of merchandise in this section mentioned, shall give away, on the Sabbath day, commonly called Sunday, any tobacco, cigars, etc., spirituous or fermented liquors, cordials, lager beer, wine, cider or any other goods, wares or merchandise whatsoever;" and certain penalties are prescribed for a violation of the statute.

The indictment contains three counts. The first charges the traversers with selling beer to Moses H. Springer on Sunday, the 19th day of October, 1879. The second charges them with "disposing of" beer to Moses H. Springer on the same day. The third charges them as "licensed dealer" with "giving away" beer to Moses H. Springer on the same day.

* See note, 32 Am. Rep. 433; *Graff v. Evans*, 8 Q. B. D. 378.

The third count was abandoned, it being conceded that the traversers were not, nor was the association of which they were officers, a licensed dealer.

The case was submitted to the court upon an agreed statement of facts, and the judgment being against the traversers they have appealed.

It appears by the statement of facts that the indictment found "against the traversers was found against them, not as individuals, charging them personally with the violation of the 'Sunday liquor law' by selling or disposing of beer on their own account, but as officers of the corporation known as the 'Concordia;' that Henry Seim is president, Louis Kraus secretary, and Andrew J. Goldenburg treasurer of the said corporation, and each is a member of the board of directors. The incorporation of the 'Concordia' under the general incorporation law of the State is admitted, and also that the corporation has duly passed certain by-laws for its better government and regulation, and it was agreed that the charter, amended charter and by-laws and the Act of 1865, chap. 23, might be read in evidence. The purposes and object of the corporation were admitted to be correctly stated in section 9 of its amended charter as follows: The 'Concordia' shall be dedicated to the intellectual, moral and social improvement of its members, the refinement of their tastes and the development of good feeling among them. In furtherance of these objects it shall afford them opportunities for scientific cultivation and rational amusements, and shall place before them as far as may be the best models of musical and dramatic art. It is further agreed that the association is conducted for the use of its member only, to provide for their rational entertainment and improvement; that it transacts no business of any kind whatsoever for the purpose of making any profit, directly or indirectly for itself or its members, and that the income derived from the various sources hereinafter enumerated is applied solely to defraying the expenses of the corporation; that the sources of its income are as follows:

"1. Money loaned by active members to defray the expense of building club-house, said loans being represented by certificates of 'property stock,' issued by the corporation. 2. Entrance fee of \$10 for each new member. 3. Annual fee of \$30 for each member. 4. Money paid by members for what refreshments and liquors they get and consume at the club-house. 5. Such additional assess-

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ments, fines and penalties as may be from time to time imposed upon the members. The money received from these various sources is expended in paying, 1st, the current expenses of the corporation, and if there is any balance, 2d, the interest on the property shares as provided in by-law 24.

“ With reference specifically to refreshments and liquors used and consumed in the club-house, it is agreed that liquors are bought by the corporation, and kept in the club-house under the charge of the steward, an employee of the corporation ; that the members of the club, and no other persons whosoever, can get what liquors they want on any day, Sunday included, from the corporation through its steward, by calling for them, and paying a price fixed by the regulations of the corporation, and that this price is fixed and paid, not for the purpose of making any profit, either directly, or indirectly, but merely for the purpose of covering the outlay in the purchase [thereof] by the corporation, and the expense attendant upon the keeping and serving thereof at the club-house. It is further agreed, that at the time and place stated in the indictment, Moses A. Springer, who is a member of ‘the Concordia,’ called for a glass of beer in the usual way, was served by the steward, drank it then and there, and paid five cents therefor, that being the price fixed by the corporation.

“ The members are admitted to the club-house, by the use of a latch key, with which each is provided, and that they use the club-house in some measure as a home, except for lodging, and that they spend much of their time there every day.

“ The association pays annually \$1,200, taxes on building, \$1,100 insurance, and \$2,500 ground-rent. Its members are regularly elected, and none but members enjoy the use of the club-house for social purposes.”

The question arising upon this statement of facts, is whether the beer furnished to Springer, a member of the association, in the manner before stated, was a sale thereof, within the meaning of the Act of 1866.

[Omitting a statutory consideration.]

After a careful consideration of the facts set out in the agreed statement, we are all of opinion that the transaction was not a sale of beer to Springer, within [the intent and meaning of the Act of 1866. In other words we think the act has no application to a case like the present.

It will be observed that the license laws, Code, art. 57, which forbid the sale or barter of spirituous or fermented liquors without a license, have never been construed as applicable to social clubs, of which there are several in Baltimore city, where liquors are procured for the use of the members, and are furnished to them in the manner described in the present case; and we think it very clear that no license is required, for the reason that such a transaction is not a sale within the meaning of the license laws. And by a parity of reason, we conclude that the members of such associations as "the Concordia" is admitted to be, who obtain refreshments and liquors at the club, by paying into the common fund the price fixed by the regulation of the society, cannot be said in any sense to buy them from the corporation, nor can the corporation be said to sell them to the members, within the meaning of the Act of 1866.

It is argued by the attorney-general that the liquors and other supplies are purchased by the corporation, and are consequently its property; and when furnished to a member, it is sold to him, and if the sale is made on Sunday, it is an offense within the Act of 1866. But that act equally prohibits the sale of any article of merchandise whatsoever on Sunday, and if the argument of the appellee be sound, the society could not furnish a meal to a member on Sunday, without violating the law, and subjecting itself or its officers to the penalties prescribed by the Act of 1866. We do not so construe the law. The society is not an ordinary corporation; but a voluntary association or club united for social purposes,—each member must be elected, and each is joint owner of the property and assets, and entitled to the privileges of the society as long as he remains a member. Among these privileges is that of partaking of the provisions and refreshments provided for the use of the members. These are not sold to him by the corporation, but furnished to him by the steward upon his paying into the common fund what is equivalent to the cost of the articles furnished, and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a barter or sale in the way of trade, and therefore not within the purview or meaning of the Act of 1866.

Judgment reversed.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

COMMONWEALTH V. MCCORMICK.

(130 Mass 61.)

Criminal law — once in jeopardy — discharge of jury.

On the trial of several, jointly indicted for assault and battery, they pleaded that on a former trial the judge discharged the jury pending the trial, without defendants' consent, because one of the jurors was discovered to be a surety upon a recognizance in the cause entered into by one of the defendants before the trial. *Held*, bad. (*See note, p. 426.*)

CONVICTION of assault and battery. The opinion states the case.

F. A. Gaskill & B. W. Potter, for defendants.

G. Marston, attorney-general, and *F. H. Gillett*, assistant attorney-general, for Commonwealth.

COLT, J. The defendants were jointly indicted for an assault and battery. They severally pleaded, in substance, that at a previous term of court a jury was impanelled and a trial begun, which, with-

out their consent, was stopped by the court, and the case taken from the jury, because one of the jurors was found to be surety upon a recognizance entered into by one of the defendants in this case. The several pleas of the defendants were overruled on demurrer; and after a verdict of guilty against all, the case is reported for the consideration of this court. The defendants contend, that upon the facts pleaded it is apparent that they have been once put in jeopardy for the same offense, and are therefore entitled to be discharged from further prosecution.

When a jury has been sworn to try the issue and the trial has been commenced, the jeopardy to which the defendant is exposed is held to have begun, and the prosecuting officer will not, pending the trial, when a verdict is demanded by the prisoner, be permitted to enter a *nolle prosequi* for the purpose of subjecting him to another trial for the same cause. *Commonwealth v. Scott*, 121 Mass. 33; *Commonwealth v. Tuck*, 20 Pick. 356; *Commonwealth v. Kimball*, 7 Gray, 328. The government chooses its own time, and cannot for its own convenience discontinue the proceedings and still hold the prisoner for trial. The principle is embodied in the common-law maxim that no man is to be brought into jeopardy more than once for the same offense. 4 Bl. Com. 335. It is a rule which has been applied with manifest justice by the courts in this country for the protection of persons charged in prosecutions for either felonies or misdemeanors, and it has been said that its true meaning is, that no man shall be twice tried for the same offense. *People v. Goodwin*, 18 Johns. 187, 201; *United States v. Perez*, 9 Wheat. 579.

From the necessity of the case however there must be many exceptions to the rule. Thus, it is held not to apply when the trial comes to an end by the sickness or death of a jurymen (*Rex v. Edwards*, 4 Taunt. 309; *United States v. Haskell*, 4 Wash. C. C. 402); or the illness of the judge (*Nugent v. State*, 4 Stew. & Port. 72); or the expiration of the term of the court (*Newton's case*, 13 Q. B. 716, and 3 Cox C. C. 489); or the impossibility of obtaining an agreement of the jury within a reasonable time, or without physical coercion (*United States v. Perez*, above cited; *Commonwealth v. Bowden*, 9 Mass. 494; *Commonwealth v. Purchase*, 2 Pick. 521 [13 Am. Dec. 452]; *Commonwealth v. Sholes*, 13 Allen, 554); or, in short, whenever the case cannot be proceeded with by reason of some physical or moral necessity arising from no fault or neglect of the government. When such is the case, the trial may be stopped,

and the defendant will not be protected from being afterward tried upon the same indictment.

In *United States v. Perez*, above cited, where the question was as to the power of the Circuit Court to discharge a jury in a capital case, and then subject the defendant to another trial, the exceptions to the rule are laid down more broadly, and it is said by Mr. Justice STORY, "that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." This is affirmed and elaborated in *United States v. Morris*, 1 Curtis C. C. 23, where it was decided, that although neither party has a right of challenge after a jury is sworn, yet it is in the discretion of the court to protect the administration of justice by investigating at any stage of the trial an objection to the impartiality of any juror, and by withdrawing the case from the jury if such juror is found unfit to sit therein. In the case cited, the court, against the prisoner's objection, withdrew a juror who was found after the trial was commenced to have a bias in the case, and Mr. Justice CURTIS declared it to be "a mistake to suppose that in a court of justice either party can have a vested right to a corrupt or prejudiced juror who is not fit to sit in judgment in the case." See also, *People v. Olcott*, 2 Johns. Cas. 301.

It is not contended that this power is given to the court to be exercised arbitrarily, or without good cause to believe that interference is necessary to prevent great injustice to one side or the other. It is to be used alike for the protection of the public and for the security of the prisoner in his right to an impartial trial; alike when the juror is so biased either against the prisoner or against the government that he is disqualified to serve upon the panel.

In the case at bar, upon the facts disclosed in the pleadings, it would seem that one of the jurors had a direct interest in securing the acquittal of all the defendants. At all events, it does not appear that the interest of the juror to obtain the release of one would not necessarily, as the case stood upon the evidence, incline him to secure the release of all. The objection to his competency or impartiality is not alleged to have been actually known to or in any way waived by the government when the jury was impanelled. The prosecuting officer cannot be said to be affected with construct-

ive notice that the juror who was sworn was the same person who was surety in the recognizance. Nor was the government, when the fact was discovered, required to discharge the recognizance in order that the trial might proceed with a juror thus improperly upon the panel. It cannot be said, as matter of law, that the judge was not justified in stopping the trial, on the ground that the ends of public justice were liable to be defeated if the case was allowed to proceed to a verdict.

Judgment on the verdict.

NOTE BY THE REPORTER. — In the recent English case of *Reg. v. Bentley*, Mr. Justice GROVE discharged the jury pending the trial, because one of the jurors arose in the box, before the conclusion of the evidence for the prosecution, and said, they did not wish to hear any more of the case ; that they had already decided on their verdict. Another said they did not believe a word the prosecution's witnesses had said, and had made up their minds not to convict. Five jurors dissented from these expressions.

COMMONWEALTH V. FORD.

(130 Mass. 64.)

Evidence — memorandum — printed report.

A newspaper reporter, called as a witness, may refresh his recollection as to an occurrence in his presence, by referring to the report of it printed from his statement made at the time. (*See note, p. 429*).

CONVICTION of larceny and assault on an officer. The opinion states the case.

H. E. Swasey & G. R. Swasey, for defendant.

F. H. Gillett, assistant attorney-general (*G. Marston*, attorney-general, with him), for Commonwealth.

ENDICOTT, J. The ruling in this case, whereby the witness was precluded from looking at the printed report in the Boston Herald to refresh his memory, seems to have been made on the ground that the witness could not be allowed to refresh his memory from a printed copy of his own written report.

We are of opinion that this ruling was erroneous ; and that the witness should have been allowed, for the purpose of refreshing his

memory, to look at the printed report, which he stated, as of his own knowledge, was printed substantially as made by him. It was not contended that the written or printed report or any portion of its contents could be put in evidence. It was clearly incompetent, in any aspect of the case, as presented. The rule, therefore, that to prove by oral testimony the contents of a paper, relied on as evidence, it is necessary first to show that it has been lost or destroyed, or that upon diligent search it cannot be found, has no application to this case. If such rule did apply, it is difficult to see why it was not competent for the defendant to prove that it was the custom in the Herald office to destroy all such original written reports after printing them; but that question it is not necessary to consider.

In order to refresh the recollection of a witness, it is not important that the paper, book, or memorandum should have been written or printed by the witness himself, or that it should be an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts if thereby called to his recollection. 1 Greenl. Ev., §§ 436-439. *Chapin v. Lapham*, 20 Pick. 467.

In *Coffin v. Vincent*, 12 Cush. 98, which was trespass for taking and carrying away certain sheep, the defendants attempted to prove that the sheep were taken by them as field-drivers, while running at large, and for that cause were taken up and impounded. To prove this, they called a witness to show the contents of the notice posted up by them as field-drivers, which notice had been lost or destroyed; and in testifying to its contents it was held that the witness could refresh his recollection by referring to a form of such notice, which, though not made by himself, he had compared with the notice posted up, and found them to correspond. In that case, the general rule applicable here is well stated, though the case differs from this in the fact that the contents of an original paper were sought to be proved, and therefore it was necessary to show that it had been lost. In this case, the original written report of the witness could not have been used in evidence. In *Kensington v. Inglis*, 8 East, 273, a license to trade with the enemy had been lost. A witness was called, who had made an entry of it in his memorandum-book for the private information of himself and his employer, which book was not produced in evidence; and it was

held that the witness might testify to the contents of the license from memory, although the book was not produced, for if in court, it would not have been evidence *per se*, but could have been used by the witness only to refresh his memory.

The case most nearly resembling the case at bar is *Horne v. Mackenzie*, 6 Cl. & Fin. 628. A surveyor made a survey and report, which he furnished to his employers, and being called as a witness he produced a printed copy of this report, on the margin of which he had two days before, to assist him in giving his explanations as a witness, made a few jottings. The printed report had been made up from his own original notes, of which it was in substance, though not in words, a transcript, and it was held that he might look at the printed copy to refresh his memory. In *Rex v. Duchess of Kingston*, 20 How. St. Tr. 355, 619, a witness was allowed to use a copy of his own memorandum made by another person in his presence. In *Burton v. Plummer*, 2 A. & E. 341, a clerk of a tradesman entered the transactions in trade, as they occurred from his own knowledge, and the tradesman copied them into a ledger in the presence of the clerk, who checked them as they were copied. It was held that the clerk might use the entries in the ledger to refresh his memory, though the waste-book was not produced nor its absence accounted for, the entries in the ledger having been made as by the clerk himself. It was in the nature of the duplicate original, and is similar to the case at bar, where the written report of the witness was printed in the newspaper, to his own knowledge substantially as made by him. See also *Burrough v. Martin*, 2 Camp. 112; *Wood v. Cooper*, 1 Car. & K. 645; *Doe v. Perkins*, 3 T. R. 749; *Regina v. Langton*, 2 Q. B. D. 296.

In *Huff v. Bennett*, 2 Seld. 337, it was said; "It is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection." So a witness may be allowed to refresh his memory from notes taken by counsel at a former trial; *Regina v. Philpotts*, 5 Cox C. C. 329; or from his deposition, or a copy of the same. *Smith v. Morgan*, 2 Mood. & Rob. 257. *George v. Joy*, 19 N. H. 544. And in *Henry v. Lee*, 2 Chit. 124, where a witness was allowed to refresh his memory from a document not written by him, Lord ELLENBOROUGH said: "If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is suffi-

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cient; and it makes no difference that the memorandum was written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness."

Exceptions sustained.

NOTE BY THE REPORTER. — To the same effect, *Commonwealth v. Jeffs*, Massachusetts Supreme Court, January, 1882. In *Queen v. Langton*, 2 Q. B. D. 296, the prisoner was time-keeper, and the witness was pay-clerk of a colliery. The prisoner gave a time-list to a clerk who entered it in the time-book, and on pay-day the prisoner read from the time-book the number of days each man had worked, to the witness who paid accordingly, and who saw the entries of that time. *Held*, that to prove these payments, the witness might refresh his recollection by referring to the time-book.

GRAVES V. DAWSON.

(130 Mass. 78.)

Malicious prosecution — termination of criminal proceeding.

The entry of *nolle prosequi* is not necessarily such a termination of a criminal proceeding as meets the requirements of a cause of action for malicious prosecution; but otherwise of the discharge of the prisoner upon failure to find an indictment. (See note, p. 432.)

ACTION for malicious prosecution. The opinion states the case. The defendant had judgment below.

J. B. Bottum, for plaintiff.

C. Delano, for defendant.

LORD, J. We think it was error in the Superior Court to sustain the demurrer in this case. The principal ground upon which it is contended that the demurrer should be sustained is that it appears by the declaration that the prosecution claimed to have been malicious was terminated by a *nolle prosequi*, and that a *nolle prosequi* is not such a legal termination of a suit as the plaintiff is required to show in order to maintain his action of malicious prosecution. *Parker v. Farley*, 10 Cush. 279, is relied upon in support of this proposition.

That case has been so many times referred to as supporting such doctrine in its broadest form, and thus apparently conflicting with other decisions in other tribunals and within our own jurisdiction,

that it is proper to examine the report of that case and see how far it accords with or differs from established principles. Upon an examination of that case it appears that nothing was decided by it except that as a matter of law the termination of a prosecution by the entry of a *nolle prosequi* was not necessarily such a termination of the suit as entitled a defendant to maintain an action for malicious prosecution. That question may be one of pure law, purely of fact, or it may be a mixed question of law and fact. *Parker v. Farley* was not heard upon demurrer nor upon exceptions. The parties foreseeing that certain questions of law which might be decisive of the case would inevitably arise during the trial, as matter of convenience and economy, agreed to present those questions of law for the decision of the court prior to the trial of the facts before a jury, and to accomplish this and render an investigation of the facts unnecessary, the chief justice of this court made a formal ruling by consent of counsel, that the action could not be maintained, and reported the case for the decision of the full court. In order to present such questions of law it became necessary to state all the facts in relation to the prosecution of the plaintiff, that the court might see whether there were facts necessarily conclusive of law against the right of the plaintiff to recover.

The facts thus presented were substantially these: Farley, one of the defendants, made complaint against Parker, the plaintiff, of having committed the crime of perjury. Upon this complaint an indictment was found against Parker, and upon that indictment Parker was tried and convicted of perjury before the Court of Common Pleas. During such trial exceptions were taken by him. Those exceptions were argued before this court and overruled, so that nothing remained in that suit, so far as the record showed, except an entry of judgment. Parker thereupon by written motion and affidavit asked for a new trial of the case because of newly discovered evidence, and this motion was allowed and a new trial was granted. Subsequently Parker applied to this court to compel the district attorney to enter a *nolle prosequi* in the suit, because of an agreement to that effect, and sometime afterward the district attorney did enter a *nolle prosequi*, and no further proceedings were had in the case, and the prosecution was thereby terminated.

The mere presentation of these facts shows that the naked question whether, as matter of law, the entry of a *nolle prosequi* is or is not such a termination of a suit as authorizes the prosecuted

party to maintain an action for malicious prosecution, was not raised. It is undoubtedly true that the chief justice was inclined to the opinion that such was the tendency of the common-law decisions; yet it is obvious that it was not necessary for him to consider that question, and it is entirely clear that he did not consider it; for he says expressly, that if under some circumstances, the rule be that a *nolle prosequi* is to be taken to be the final termination of the suit, "we should be of opinion that it would not apply, when a *nolle prosequi* and discontinuance is entered by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right, or sought for as a favor, by the party prosecuted. In the present case it appears by the record that the plaintiff endeavored to obtain such exemption from trial by requiring the district attorney to enter a *nolle prosequi*."

But the other point decided in *Parker v. Farley* was absolutely decisive of the case. A jury properly impanelled, under correct instructions in law, had found the plaintiff guilty of the crime of perjury. Upon his application the court had granted him a new trial. He never had a new trial, he did not desire a new trial, he asked to have a *nolle prosequi* entered, he applied to this court to compel the district attorney to enter it, and it was subsequently entered; and upon that state of facts the court held that the record showed conclusively probable cause for the prosecution, and consequently that no action could be maintained by the plaintiff. We think therefore as matter of law it cannot be said that the entry of a *nolle prosequi* is conclusive upon the rights of a party.

The authorities upon this subject are carefully collated and arranged by the present chief justice of this court in *Cardinal v. Smith*, 109 Mass. 158, and the result of all those authorities is, that whether a prosecution has been so terminated as to authorize the party prosecuted to commence an action for malicious prosecution is to be determined by the facts of the particular case, of which facts the entry of a *nolle prosequi* may be one of several, may be the only fact, may be a controlling fact, or may be an entirely unimportant one.

We have discussed this question thus far as if the proceedings in this case had been terminated by a *nolle prosequi*. But that entry may have been a wholly unimportant and immaterial one, or indeed an incompetent fact. The plaintiff avers that he was held for appearance before the Superior Court at the term holden on the third Monday of December, 1872, and that authenticated copies of the

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complaint and warrant and proceedings thereon were entered upon the docket of that court; and though he does not state the facts chronologically in his declaration, yet he does state the fact that at such term of the court the grand jury found no bill against him, and that on the 26th day of December he was discharged from custody under such complaint by order of the Superior Court; and it has been repeatedly held that the discharge of a party because the grand jury found no bill against him is a legal end to the prosecution. See cases cited in *Cardinal v. Smith, ubi supra*. The plaintiff avers in his declaration that this complaint was entered upon the docket of the Superior Court at December term, 1872, and avers further that the district attorney at the corresponding term of the court a year afterward entered a *nolle prosequi*. This fact may or may not be important. If in point of fact it shall appear that the grand jury found no bill, and by reason thereof the court ordered the discharge of the party at the same term of the court, it is difficult to understand what legitimate results would follow from the subsequent entry of a *nolle prosequi*, or how the rights of a party discharged a year before that entry could be affected.

It is sufficient if the plaintiff in his declaration states facts upon which, if proved, he would be entitled to a verdict. We think he has stated such facts in his declaration. Whether when he offers his proofs it shall be found that they are insufficient in law or in fact to support his allegations, is a matter into which we cannot inquire upon this demurrer.

Demurrer overruled.

NOTE BY THE REPORTER.—In *Apgar v. Woolston*, 14 Vroom, 51, it was held as follows: No action for a malicious prosecution can be brought while the criminal proceedings are pending. When the criminal prosecution is ended, if it terminates in favor of the accused, he may then maintain his action for a malicious prosecution. Except to confer on the accused the capacity to sue, the manner in which the prosecution terminated is immaterial. The law requires only that the particular prosecution complained of shall have been terminated—and not that the liability of the plaintiff to prosecution for the same offense shall have been extinguished—before the action for malicious prosecution is brought. Consequently the refusal of the grand jury to find an indictment, a *nolle prosequi*, or any proceeding by which the particular prosecution is disposed of in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*, is a sufficient termination of the prosecution to enable the plaintiff to bring his action. *Johnstone v. Sutton*, 1 T. R. 544; *Stewart v. Sonneborn*, 98 U. S. 187; *Purcell v. McNamara*, 1 Camp. 199; and 9 East, 371; *Sykes v. Dunbar*, 1 Camp. 202; *Incedon v. Berry*, id. 203; *Wallis v. Alpine*, id. 204; *Taylor v. Willans*, 2 B. & Ad. 845; *Nicholson v. Coghill*, 4 B. & C. 21; *Blatchford v. Dod*, 2 B. & Ad. 173; *McDonald v. Rooke*, 2 Bing. N. C. 217, *Davis v. Pardy*, 6 B. & C. 225; *Panton v. Williams*, 2 Q. B. 169; *Turner v. Ambler*, 10 id. 232. The only exception to the rule that no action will lie for a malicious prosecution until the criminal prosecution has terminated in the plaintiff's favor, is where the prosecution is in itself of such a nature that the accused has no opportunity to contest the complaint and

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obtain a decision in his favor ; as where the plaintiff was committed on articles of peace, for a definite term, unless he should find sureties for the peace. In such a case the plaintiff is allowed, *ex necessitate rei*, to maintain his action, though he was discharged by the effluxion of the time for which he was committed, for the reason that he is not at liberty to controvert the statement of the defendants in making the complaint, and therefore could not have a hearing and obtain a favorable decision. *Steward v. Gromett*, 7 C. B. (N. S.) 191; *Castrique v. Behrens*, 3 E. & E. 708; *Basebe v. Matthews*, L. R., 2 C. P. 684. A discharge under a statute for not bringing on the trial of an indictment at the term in which issue is joined, or at the term after, operates only to discharge the accused from imprisonment or from his recognizance, and not from the indictment or from the legal consequences of his crime, and is not such a termination of the criminal prosecution as will enable the accused to bring an action for malicious prosecution. The *dictum*, in *Potter v. Casteline*, 12 Vroom, 22, that a rejection of the complaint by the grand jury is, in an action for a malicious prosecution, *prima facie* evidence of want of probable cause, disapproved. *Clark v. Cleveland*, 6 Hill, 344; *King v. Prichard*, 1 Keble, 525; *Queen v. Banks*, 6 Mod. 246.

 NEWTON V. SEAMAN'S FRIEND SOCIETY.

(130 Mass. 91.)

Will: — extrinsic paper referred to — admission of, to probate, after will.

A paper referred to in a will, and containing directions for the disposition of the estate, but not executed or witnessed as a will, should be admitted to probate as part of the will, if it was in existence at the date of the will and is clearly identified ; and when omitted by mistake at the probate of the will, it may be afterward admitted, although the time for appealing from the decree of probate has elapsed.

A PPEAL from a decree admitting a book to probate as part of a will. The opinion states the facts.

W. W. Rice & S. Haynes, for appellants.

W. S. B. Hopkins, for appellees.

GRAY, C. J. If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such. *Allen v. Maddock*, 11 Moore P. C. 427 ; *Singleton v. Tomlinson*, 3 App. Cas. 404 ; *Jackson v. Babcock*, 12 Johns. 389 ; *Tonnele v.*

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Hall, 4 Comst. 140 ; *Chambers v. McDaniel*, 6 Ired. 226 ; *Beall v. Cunningham*, 3 B. Monr. 390 ; *Harvy v. Chouteau*, 14 Mo. 587.

In *Loring v. Sumner*, 23 Pick. 98, 102, Mr. Justice MORTON said, "There is no doubt that a valid bequest or devise may be made by reference to objects and documents not incorporated in or annexed to the will." In that case the will contained this clause : "I have given to my son, Nathaniel Loring, Jr., one thousand dollars by note for his full part of my estate." It was held that this was a valid legacy of the sum of \$1,000, although the note had no validity as a note, for want of consideration, and had not been made with any testamentary intent. It is true that the amount of the legacy there appeared on the face of the will. But in *Wilbar v. Smith*, 5 Allen, 194, this feature was wanting ; the testator, having signed and delivered to four of his children respectively promissory notes, which were without consideration and ineffectual as gifts *mortis causa*, on the same day made his will, by which, after various pecuniary legacies to other children and grandchildren, he gave to the four children "an equal proportion with" the others, "each to have in the same proportion as I give in this will, together with the notes of this date to" the four children ; and it was held that the four took specific legacies of the amounts of the notes. And in *Thayer v. Wellington*, 9 Allen, 283, 292, it was said by the court, "A testator may refer expressly to a paper already executed, and describe it with such particularity as to incorporate it virtually into the will, or he may refer to deeds or other instruments, or monuments, or existing facts, to which reference may be had in construing his will."

In *Allen v. Maddock*, above cited, a codicil headed, "This is a codicil to my last will and testament," was duly executed and attested in 1856 ; upon search among the papers of the testatrix after her death, there was found, inclosed in a sealed envelope on which were written the words "Mrs. Ann Foote's will," a will executed by her in 1851, but not so attested as to have any validity as a will, and no other testamentary paper of any description was found. Mr. PEMBERTON LEIGH (afterward Lord KINGSDOWN) delivered the judgment of himself, Dr. LUSHINGTON, Sir EDWARD RYAN and Sir CRESSWELL CRESSWELL, affirming the decree of Sir JOHN DODSON, reported in Deane, 325 ; and upon an elaborate review of the authorities, holding that this will was sufficiently identified as the last will referred to by the codicil of 1856, and was incorporated

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with and made valid by that codicil, and that the two should be admitted to probate as together constituting the last will and codicil of the testatrix, although, as was observed in the judgment, since the St. of 7 W. Iv. & 1 Vict., c. 26 (as under our Gen. Sts., c. 92, § 6), "no paper not properly executed and attested can, in strictness, be for any purpose a will or codicil."

Several decisions of Sir HERBERT JENNER FUST since the statute, not referred to in that judgment, are to the like effect. For instance, where a widow made a will devising and bequeathing all her real and personal estate upon the trusts expressed in the will of her late husband, which she described by its date and as having been afterward revoked, it was held that the revoked will of her husband should be admitted to probate as part of her will. *Goods of Durham*, 1 Notes of Cases, 365 ; s. c., 3 Curt. Eccl. 57. So where a testator left property to his eldest son, in trust for himself and the other children as expressed in an indenture of settlement made between him and the testator two years before, it was held that the indenture was part of the will, but that as the original indenture ought to be retained by the trustee, a notarial copy should form part of the probate. *Goods of Dickins*, 1 Notes of Cases, 398 ; s. c., 3 Curt. Eccl. 60. And where a testator left a will and codicil, and on the first page of the will referred to "the paper hereunto annexed, as a further distribution of my effects," and at his death the will and codicil were found in a sealed packet, and attached to the will by a pin was a paper containing such a disposition and stated by the testator to be the paper referred to in the will, this paper was admitted to probate as part of the will. *Goods of Willesford*, 1 Notes of Cases, 404 ; s. c. 3 Curt. Eccl. 77. See also *Goods of Bacon*, 3 Notes of Cases, 644 ; *Goods of Smartt*, 4 Notes of Cases, 38.

In *Dickinson v. Stidolph*, 11 C. B. (N. S.) 341, a testatrix, on August 27, 1819, made a will executed and attested in the manner required to pass both real and personal estate, making specific devises and bequests containing no residuary devise, appointing an executrix, and "revoking all former wills, excepting two memorandums dated May 10, 1819, which are to remain in force with this my last will." After death, one memorandum only dated May 10, 1819, was found, which was signed by her and attested sufficiently for a will of personal property, but not for a will of real estate, and which, though not styling itself a will, purported to dispose of her property, without mentioning whether it was real or personal.

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This memorandum was admitted to probate with the will, but by the law of England was not thereby established as to real estate. But, in an action at law to try the title to the real estate, it was held after advisement, in a judgment delivered by Mr. Justice WILLIAMS (the author of the Treatise on Executors, and a master of the law of wills) in behalf of himself and of Chief Justice ERLE and Justices WILLES and BYLES, that the memorandum was incorporated in and republished by the will, and operated on the real estate of the testatrix.

In *Quihampton v. Going*, 24 W. R. 917, a testator by his will declared, for the information of his trustees, that the amounts or values entered on a certain page of his ledger, dated fourteen days earlier than the will and signed by him, were the only advancements either by way of gift or loan, previously made by him to any of his children. Sir GEORGE JESSELL, M. R., held that the entries so signed on that page of the ledger must be regarded as part of the will, and conclusive for the purposes of the will, although the sums entered therein differed from those in fact received by the children.

The cases of *Smart v. Prujean*, 6 Ves. 560; *Wilkinson v. Adam*, 1 V. & B. 422, *Dillon v. Harris*, 4 Bligh N. R. 321, and *Croker v. Hertford*, 4 Moore P. C. 339, merely show that clear proof of the identity of the paper referred to, and of its existence at the time of the execution of the will, is essential, and was not made to the satisfaction of the court in those cases.

It is usual and proper, though not absolutely necessary, that a paper sufficiently referred to, and in existence at the date of the will, and clearly identified, should be set out in the probate; and this should always be done when the executors desire it, and the paper is in their possession, in order that the entire disposition of the estate may appear upon the record. *Sheldon v. Sheldon*, 3 Notes of Cases, 250; s. c., 1 Rob. Eccl. 81; *Goods of Sibthorp*, L. R., 1 P. & D. 106; *Bizzey v. Flight*, 3 Ch. Div. 269; *Quihampton v. Going*, above cited.

In the present case, the testator by the third codicil expressly revokes that part of the will which gives the directions for the payment of legacies, and orders and directs his executors to pay the legacies mentioned in his will and codicils as nearly as may be according to the directions written in a book by Melvin W. Pierce, signed by the testator and witnessed by Pierce. The book admitted to probate contains such directions, so written, signed and witnessed,

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specifying the property out of which each legacy is to be paid; and with the exception of two memoranda in the margin, which were excluded from the probate, is agreed by the parties to have been in its present form at the time of the making of the third codicil. There is no doubt therefore of the identity of the document referred to, nor of its existence at the date of the execution of the testamentary instrument which refers to it.

The fact that the book was in the possession and control of the testator might require a close scrutiny of the evidence that it remained in the same condition as at the time of the execution of the codicil, if there were any controversy upon that point, but is otherwise immaterial. It is not necessary that every portion of a will should be verified by the signature of the testator and the attestation of the witnesses; it is sufficient that the different sheets or papers should clearly appear upon their face, or by extrinsic evidence, to have formed part of the will at the time of its execution and attestation. *Ela v. Edwards*, 16 Gray, 91, 99; *Marsh v. Marsh*, 1 Sw. & Tr. 528.

The document in question, which was in law part of the will, having by mistake not been presented for probate with the will, the Probate Court had, and rightly exercised, the power to admit it to probate afterward. *Waters v. Stickney*, 12 Allen, 1; *Musser v. Curry*, 3 Wash. C. C. 481.

Decree affirmed.

 OSBORNE V. MORGAN.

(130 Mass. 102.)

Master and servant — action by servant against co-servant for negligence.

One servant may maintain an action for an injury negligently inflicted on him by a co-servant. (*See note, p. 442.*)

ACTION of damages for personal injury by negligence. The opinion states the case. The defendant had judgment below.

G. F. Verry & H. L. Parker, for plaintiff.

W. S. B. Hopkins & H. F. T. Blackmer, for defendants.

GRAY, C. J. The declaration is in tort and the material allegations of fact, which are admitted by the demurrer, are that while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up by direction of the corporation certain partitions in a room in which the corporation was conducting the business of making wire, the defendants, one, the superintendent, and the others, agents and servants of the corporation being employed in that business, negligently and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room and suffered them to remain there in such a manner and so unprotected from falling that by reason thereof they fell upon and injured the plaintiff. Upon these facts the plaintiff was a fellow-servant of the defendants. *Farwell v. Boston & Worcester Railroad*, 4 Metc. 49; *Albro v. Agawam Canal*, 6 Cush. 75; *Gilman v. Eastern Railroad*, 10 Allen, 233 and 13 id. 433; *Holden v. Fitchburg Railroad*, 129 Mass. 268; *Morgan v. Vale of Neath Railway*, 5 B. & S. 570, 736 and L. R., 1 Q. B. 149.

The ruling sustaining the demurrer was based upon the judgment of this court delivered by Mr. Justice MERRICK in *Albro v. Jaquith*, 4 Gray, 99, in which it was held that a person employed in the mill of a manufacturing corporation who sustained injuries from the escape of inflammable gas, occasioned by the negligence and unskilfulness of the superintendent of the mill in the management of the apparatus and fixtures used for the purpose of generating, containing, conducting and burning the gas for the lighting of the mill, could not maintain an action against the superintendent. But upon consideration we are all of the opinion that that judgment is supported by no satisfactory reasons and must be overruled.

The principal reason assigned was that no misfeasance or positive act of wrong was charged and that for nonfeasance, which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, an agent or servant was responsible to him only and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only and not for nonfeasance. And it is doubtless true that if an agent never does any thing toward carrying out his contract with his principal but wholly omits or neglects to do so, the principal is the only person who can maintain any action

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against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly. Ulpian in Dig. 9, 2, 27, 9; *Parsons v. Winchell*, 5 Cush. 592; *Bell v. Josselyn*, 3 Gray, 309; *Nowell v. Wright*, 3 Allen, 166; *Horner v. Lawrence*, 8 Vroom, 46. Negligence and unskilfulness in the management of inflammable gas, by reason of which it escapes and causes injury, can no more be considered as mere nonfeasance within the meaning of the rule relied on, than negligence in the control of fire as in the case in the Pandects; or of water as in *Bell v. Josselyn*; or of a drawbridge as in *Nowell v. Wright*; or of domestic animals as in *Parsons v. Winchell*, and in the case in New Jersey.

In the case at bar the negligent hanging and keeping by the defendants of the block and chains in such a place and manner as to be in danger of falling upon persons underneath, was a misfeasance or improper dealing with instruments in the defendant's actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall and who is not prevented by his relation to the defendants from maintaining the action. Both the ground of action and the measure of damages of the plaintiff are different from those of the master. The master's right of action against the defendants would be founded upon his contract with them, and his damages would be for the injury to his property, and could not include the injury to the person of this plaintiff, because the master could not be made liable to him for such an injury resulting from the fault of fellow-servants, unless the master had himself been guilty of negligence in selecting or employing them. The plaintiff's action is not founded on any contract but is an action of tort for injuries which according to the common experience of mankind were a natural consequence of the defendant's negligence. The fact that a wrongful act is a breach of a contract between the wrong-doer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby.

Hawkesworth v. Thompson, 98 Mass. 77; *Norton v. Sewall*, 106 id. 143; s. c., 8 Am. Rep. 298; *May v. Western Union Telegraph*, 112 Mass. 90; *Grinnell v. Western Union Telegraph*, 113 id. 299, 305; s. c., 18 Am. Rep. 485; *Ames v. Union Railway*, 117 Mass. 541; s. c., 19 Am. Rep. 426; *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Rapson v. Cubitt*, 9 M. & W. 710; *George v. Skivington, L. R.*, 5 Exch. 1; *Parry v. Smith*, 4 C. P. D. 325; *Foulkes v. Metropolitan Railway*, 4 id. 267 and 5 id. 157. This case does not require us to consider whether a contractor or a servant who has completed a vehicle, engine or fixture, and has delivered it to his employer, can be held responsible for an injury afterward suffered by a third person from a defect in its original construction. See *Winterbottom v. Wright*, 10 M. & W. 109; *Collis v. Selden, L. R.*, 3 C. P. 495; *Albany v. Cunliff*, 2 Comst. 165; *Thomas v. Winchester*, 2 Seld. 397, 408; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 127; s. c., 15 Am. Rep. 389.

It was further suggested in *Albro v. Jaquith*, that many of the considerations of justice and policy, which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of negligence of the others, were equally applicable to actions brought for like causes by one servant against another. The only such considerations specified were that the servant, in either case, is presumed to understand and appreciate the ordinary risk and peril incident to the service, and to predicate his compensation, in some measure, upon the extent of the hazard he assumes, and that "the knowledge, that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other laborers engaged in the same common work, will naturally induce each one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus by increased vigilance to promote the welfare and safety of all." The cases cited in support of these suggestions were *Farwell v. Boston & Worcester Railroad*, 4 Metc. 49, and *King v. Boston & Worcester Railroad*, 9 Cush. 112, each of which was an action by a servant against the master; and it is hard to see the force of the suggestions as applied to an action by one servant against another servant.

Even the master is not exempt from liability to his servants for his own negligence; and the servants make no contract with, and receive no compensation from, each other. It may well be doubted

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whether a knowledge, on the part of the servants, that they were in no event to be responsible in damages to one another, would tend to make each more careful and prudent himself. And the mention by Chief Justice SHAW, in *Farwell v. Boston & Worcester Railroad*, of the opportunity of servants, when employed together, to observe the conduct of each other, and to give notice to their common employer of any misconduct, incapacity, or neglect of duty, was accompanied by a cautious withholding of all opinion upon the question whether the plaintiff had a remedy against the person actually in default; and was followed by the statement, (upon which the decision of that case turned, and which has been affirmed in subsequent cases, some of which have been cited at the beginning of this opinion), that the rule exempting the master from liability to one servant for the fault of a fellow-servant did not depend upon the existence of any such opportunity, but extended to cases in which the two servants were employed in different departments of duty, and at a distance from each other. 4 Metc. 59-61.

So far as we are informed, there is nothing in any other reported case, in England or in this country, which countenances the defendants' position, except in *Southcote v. Stanley*, 1 H. & N. 247; s. c., 25 L. J. (N. S.) Ex. 339; decided in the Court of Exchequer in 1856, in which the action was against the master, and Chief Baron POLLOCK and Barons ALDERSON and BRAMWELL severally delivered oral opinions at the close of the argument. According to one report, Chief Baron POLLOCK uttered this dictum: "Neither can one servant maintain an action against another for negligence while engaged in their common employment." 1 H. & N. 250. But the other report contains no such dictum, and represents Baron ALDERSON as remarking that he was "not prepared to say that the person actually causing the negligence" (evidently meaning "causing the injury," or "guilty of the negligence,") "whether the master or servant, would not be liable." 25 L. J. (N. S.) Ex. 340. The responsibility of one servant for an injury caused by his own negligence to a fellow-servant was admitted in two considered judgments of the same court, the one delivered by Baron ALDERSON four months before the decision in *Southcote v. Stanley*, and the other by Baron BRAMWELL eight months afterward. *Wiggett v. Fox*, 11 Exch. 832, 839; *Degg v. Midland Railway*, 1 H. & N. 773, 781. It has since been clearly asserted by Barons POLLOCK and HUDDLE-

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STON. *Swainson v. Northeastern Railway*, 3 Exch. D. 341, 343. And it has been affirmed by direct adjudication in Scotland, in Indiana, and in Minnesota. *Wright v. Roxburgh*, 2 Ct. of Sess. Cas. (3d series) 748; *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacker*, 66 id. 547; s. c., 32 Am. Rep. 114; *Griffiths v. Wolfram*, 22 Minn. 185.

Exceptions sustained.

NOTE BY THE REPORTER.—In *Griffiths v. Wolfram*, *supra*, the court said: "Whoever was guilty of the negligence, if there was any, is liable to plaintiff, unless there was contributory negligence on his part, for any injury which he sustained by reason of it. This liability does not rest upon any duty imposed by privity of contract, for in such cases there may not be and frequently is not any such privity. But the duty of each to do the work with proper care grew out of the relation which existed between them as persons engaged in the same work; for where several persons are engaged in the same work, in which the negligent or unskillful performance of his part by one may cause danger to the others, in which each must necessarily depend for his safety upon the good faith, skill and prudence of each of the others in doing his part of the work, then it is the duty of each to the others engaged in the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances."

BOWMAN V. HILLER.

(130 Mass. 153.)

Negotiable instrument — duress of maker — indorser's liability.

The duress of the maker of a promissory note will not avail a voluntary indorser for a sufficient consideration.

ACTION on a promissory note against indorser. The opinion states the case. The defendant had judgment below.

C. W. Richardson, for plaintiffs.

W. C. Fabens, for defendants.

MORTON, J. The question whether the defendant John G. Hiller signed the note in suit under duress does not seem to us to be material in this case. The referee finds that the said Hiller, being the financial secretary of the Marblehead Reform Club, misappropriated the funds of the club to the amount of the note in suit, "under circumstances that would reasonably justify the parties interested in the suspicion that it was taken fraudulently." The note in suit was given in discharge of this liability. If the threats

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of prosecution recited by the referee in his award were sufficient to show duress as to him, which we do not decide, such duress would be no defense to the other defendants. They signed the note upon a sufficient consideration, and without any coercion or restraint operating upon them. The duress of their principal did not affect their free agency, and will not defeat the promise which they voluntarily made. *Robinson v. Gould*, 11 Cush. 55, and cases cited.

[Omitting a minor point.]

Judgment for the plaintiffs.

MORAN V. GOODWIN.

(120 Mass. 158.)

Civil damage act — action by husband for intoxication of wife.

A husband may maintain an action under the civil damage act, for injury to his "means of support" by the intoxication of his wife caused by the defendant.

ACTION under the civil damage act, by husband for injury to his "means of support" by the intoxication of his wife by liquors sold her by the defendant. The plaintiff had judgment below.

J. P. Sweeney, for defendant.

E. J. Sherman & C. U. Bell, for plaintiff.

LORD, J. In the construction of a statute, all its language is to be regarded, not only for the purpose of showing the general purpose and object, but also to ascertain if any private or special wrong is to be remedied, or injury is to be redressed. The general purpose of the Statute of 1879, chapter 297, is expressed in its title: "An act to provide for the recovery of damages for injuries caused by the use of intoxicating liquors." The statute commences with a very unusual phraseology; a phraseology which the legislature undoubtedly deemed peculiarly appropriate to the subject-matter of the statute: "Every husband, wife, child, parent, guardian, employer,

or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action." We think this phraseology has a force, and gives character to the purpose of the legislature, and the objects to be accomplished by it, beyond what would be found in the use of language as ordinarily applied in a statute, "any person who shall be injured," etc. We think the language itself imports that the relations of husband and wife, parent and child, guardian and ward, employer and employed, are valuable relations; that they are themselves the subject of injury; that those relations themselves may be so affected by the excessive use of intoxicating liquors as to constitute a substantial injury. That is, that drunkenness of a husband may be of substantial injury to the wife; of the wife, to the husband; of the parent, to the child; of the child, to the parent, etc.; and the subsequent provision that a married woman may sue in her own name and recover damages to her separate use, and the provision that a minor child may recover damages, which shall be secured to the minor himself, or a trustee for his use, as the court may direct, tends also very strongly to show that the legislature regarded as capable of injury the family and social relations, which drunkenness abases and destroys, and that the extent of such injury is a proper subject of judicial inquiry.

It is not necessary however to rely upon this construction of the statute to enable this party to maintain his action. His suit is brought for furnishing liquor which caused the intoxication of his wife. How far that intoxication was an injury to his means of support was a question for the jury. That the relation of husband and wife may be such that in fact as well as in law the wife may be wholly or in part a means of support to her husband, is very clear; and whether such relationship exists, and how far the means of support are injured, are purely questions of fact, to be determined by the jury upon proper instructions from the court, which in this case were given.

The claim that the statute is unconstitutional, because in derogation of the contract of license itself, clearly cannot be supported. The license is not a contract. The license is simply an authority to sell according to law, and subject to all the limitations, restrictions and liabilities which the law imposes.

Exceptions overruled.

NICHOLS V. ALLEN.

(180 Mass. 211.)

Will — trust — uncertainty — charity — deserving.

A bequest to executors in trust to "distribute to such persons, societies or institutions as they may consider most deserving," is void for indefiniteness. (See note, p. 453).

BILL to avoid a trust. The opinion states the case.

W. G. Russell & G. Putnam, for defendants.

A. A. Ranney, for plaintiff.

GRAY, C. J. Two general rules are well settled: 1st. When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives, or to the testator's residuary legatees or next of kin. *Briggs v. Penny*, 3 DeG. & Sm. 525, and 3 Macn. & Gord. 546; *Thayer v. Wellington*, 9 Allen, 283; *Sheedy v. Roach*, 124 Mass. 472; s. c., 26 Am. Rep. 680. 2d. A trust which by its terms may be applied to objects which are not charitable in the legal sense, and to persons not defined, by name or by class, is too indefinite to be carried out. *Morice v. Bishop of Durham*, 9 Ves. 399, and 10 id. 521; *James v. Allen*, 3 Meriv. 17; *Chamberlain v. Stearns*, 111 Mass. 267. The cases illustrating the application of these rules, referred to in the able and elaborate arguments of counsel, are so numerous, and each case depends so much upon the wording of the particular instrument, that we shall mention those cases only which were most relied on. But it will be convenient first to examine the bequest before us.

The terms of this bequest clearly manifest the intention of the testatrix to create a trust. The bequest contains no words tending to show that the executors are to take the property, or any part of it, absolutely or for their own benefit; and by our law no such intention is to be implied. *Hays v. Jackson*, 6 Mass. 149, 152, 153; *Winship v. Bass*, 12 id. 198, 204; *Nickerson v. Bowly*, 8 Metc. 424,

431; Story Eq. Jur., § 1208. The bequest is not to the executors by name, but is to them and the survivor of them, and to their successors in the administration of the estate. All the property given to them is "to be by them distributed;" the direction to distribute is as broad as the gift. The property is not "to be disposed of" at the unqualified discretion of the executors, but is "to be distributed" according to their judgment of the deserts of the beneficiaries. The objects of the bounty of the testatrix are not otherwise designated than as "such persons, societies or institutions as they may consider most deserving." And there is no indication of an intention that the executors shall not be held legally accountable for a proper execution of the trust.

The strongest case in favor of the defendants is *Gibbs v. Rumsey*, 2 V. & B. 294, in which a bequest to the executors named in the will, "to be disposed of unto such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion shall think proper and expedient," was held by Sir WILLIAM GRANT to give the executors a purely arbitrary power of disposition, and consequently a beneficial interest. That case differs from the present one in at least three important particulars: 1st. The bequest was only to the executors named. 2d. Much stress was laid on the fact that the words "in trust" had been used in many other places in the will, and were omitted in this clause. 3d. An authority to those, to whom the legal title is given, "to dispose of" the property "in such manner and in such sums and to such persons as they may think proper," is more consistent with an arbitrary power of disposition than is a direction "to distribute" the property "to such persons, societies or institutions as they may think most deserving." And the decision in *Gibbs v. Rumsey* has always been treated by the English courts as not to be extended beyond its special circumstances.

In *Ralston v. Telfair*, 2 Dev. Eq. 255, also the bequest to executors, which was held by the Supreme Court of North Carolina to be for their own use, was in the less restricted form "to be disposed of as my executors think proper." In the subsequent case of *Green v. Collins*, 6 Ired. 139, the same court held that a residuary bequest to the testator's wife, "to be divided among my children as she thinks proper," created a plain trust for the benefit of the children.

Two cases resembling *Gibbs v. Rumsey*, much more nearly than

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the present case does, were decided by Sir JOHN LEACH. One was a residuary bequest to executors in trust, in default of further directions of the testator, to pay and apply the same to any lawful charitable public purposes, or to any person or persons, and in such shares and proportions, sort, manner and form, as they in their discretion should think fit. *Vezev v. Jamson*, 1 Sim. & Stu. 69. The other was of a residuary bequest to executors "upon trust to dispose of the same at such times and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion." *Fowler v. Garlike*, 1 Russ. & Myl. 232. Each was held to be a plain gift in trust, and therefore not to the executors for their own benefit; but too uncertain for the court to execute, and therefore a resulting trust to the next of kin.

So where a testator gave a fund to his executors upon certain trusts, and declared it to be his will that in the event of the failure of these trusts (which actually happened) his said trustees and the survivor of them, his executors or administrators, should apply the same "to and for such charitable or other purposes as they shall think fit, without being accountable to any person or persons whomsoever for such their disposition thereof," Lord Chancellor COTTENHAM held that this was a gift in trust, but too uncertain to be carried into effect. He distinguished the case from *Gibbs v. Rumsey*, and approved the decision in *Fowler v. Garlike*, and made these observations, which are quite applicable to the case before us: "If the fund were intended for the executors' own benefit, the testator might have left with them the option of disposing of it; but they are to pay and apply it for certain purposes mentioned in the will. Then again the direction to the executors to pay and apply the fund to such charitable or other purposes as they should think fit, is very inconsistent with the notion that they were to be absolutely entitled to it." *Ellis v. Selby*, 1 Myl. & Cr. 286, 296.

The omission of the words "in trust" is unimportant where, as in the case before us, an intention is clearly manifested that the whole property shall be applied by the legatees for the benefit of others than themselves.

Thus where a sum of money was given to a niece of the testator "for the express purpose of enabling her to present to either branch of my family any portion of the interest or principal thereon as she may consider the most prudent, and in the event of her death I

empower her to dispose of the same by will or deed to those or either branch of her family she may consider most deserving thereof," it was held by Lord LANGDALE, M. R., and by Lord COTTENHAM on appeal that the gift was in trust, but that the trust being too indefinite to be executed, the sum was part of the donor's general estate. *Stubbs v. Sargon*, 2 Keen, 255, and 3 Myl. & Cr. 507.

A like decision was made in *Buckle v. Bristow*, 10 Jur. (N. S.) 1095, where a testator, after giving bequests and legacies to several charitable institutions by name, gave the residue of his property upon trust for his executors to hold the same for such uses and purposes as he might by codicil or deed direct or appoint, and in default thereof then for the same to be expended and appropriated within three years, in such way and amounts, and for such purposes as they might in their judgment and discretion agree upon. Vice-Chancellor WOOD (afterward Lord Chancellor HATHERLEY) said that even if the words "in trust" had been omitted, and the word "appropriated" had been used alone without the word "expended," the result must have been the same; and that the decision in *Gibbs v. Rumsey* went "to the very outside of the doctrine," and "no case would be decided according to it where the gift is not precisely and distinctly in the words there mentioned." See also *Yeap Cheah Neo v. Ong Cheng Neo*, L. R., 6 P. C. 381, 389, 390.

In *McCormick v. Grogan*, L. R., 4 H. L. 82, the devise was absolute and unqualified of the testator's whole property to the defendant, whom he described as "my most sincere and valued friend," and appointed sole executor; and the instrument relied upon as creating a trust was a letter addressed to the defendant in which the testator expressed his intentions that certain persons should receive certain sums of money, but besides otherwise signifying that he left it to the defendant to carry out the intentions as he might think best, said, "I do not wish you to act strictly to the foregoing instructions but leave it entirely to your own good judgment to do as you think I would if living and as the parties are deserving; and as it is not my wish that you should say any thing about this document, there cannot be any fault found with you by any of the parties should you not act in strict accordance with it." Such was the case of which Lord HATHERLEY (adopting the words of Lord Justice CHRISTIAN in the court below) said that if it were possible to look into the thoughts of the testator when he was inditing the

will and letter he was "persuaded that what we should find there would be a purpose to this effect, to set up after his decease, not an executor or a trustee, but as it were a second self, whom, while he communicates to him confidentially his ideas as to the distribution of his property, he desires to invest with all his own irresponsibility in carrying them into effect." L. R., 4 H. L. 95.

In *Meredith v. Meneage*, 1 Sim. 542, a devise of a testator's estate to his wife "unfettered and unlimited, in full confidence and with the firmest persuasion that in her future disposition and distribution thereof she will distinguish the heirs of my late father by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference," was held by the House of Lords, upon the advice of Lord ELDON and Lord REDESDALE, not to create a trust, because the words "unfettered and unlimited" precluded the inference of such an intention.

In *Lambe v. Eames*, L. R., 10 Eq., 267 and L. R., 6 Ch. 597, the bequest was to the testator's wife, "to be at her disposal in any way she may think best for the benefit of herself and family." And several of the other cases cited at the bar were of unsuccessful attempts to impose a trust by reason of mere precatory words upon property bequeathed to a wife or child absolutely and without restriction. *Sale v. Moore*, 1 Sim. 534; *Reid v. Atkinson*, Ir. R., 5 Eq. 373; *in re Bond*, 4 Ch. D. 238; *Spooner v. Lovejoy*, 108 Mass. 529; *Hess v. Singler*, 114 id. 56; *Sears v. Cunningham*, 122 id. 538.

In *Stead v. Mellor*, 5 Ch. D. 225, the testatrix gave her personal estate to her executors upon trust to convert into money, and after payment of expenses, debts and legacies, to hold the residue in trust for such of two nieces of hers as should be living at her death, "my desire being that they shall distribute such residue as they think will be most agreeable to my wishes;" and Sir GEORGE JESSEL, M. R., held that the nieces took the residue for their own benefit. To have held otherwise would have been to engraft a trust upon a trust, in a case in which, as the master of the rolls observed, the testatrix had used the words "in trust" in the gift to the executors only, and beyond that had merely expressed a desire that the nieces should distribute the residue, not "in accordance with my views and wishes," or "as they know will be most agreeable to my wishes," but "as they think will be most agreeable to my wishes."

The decision in *Wells v. Doane*, 3 Gray, 201, turned upon the

peculiar provisions of the will. The testatrix, after devising and bequeathing the residue of her estate "to my nephew Seth Wells," for life, and at his death to such charities as should be deemed most useful by his executor or administrator, added, "And it is my will and intention that the said Seth Wells may dispose of the furniture, plate, pictures and all other articles now in my house, absolutely, as he may deem expedient, in accordance with my wishes as otherwise communicated by me to him." Taking the two clauses together, the court concluded that they had the same meaning as if the will read thus: "I give all the residue of my property, except the articles in my house, to Seth Wells for life, and I authorize him to dispose of those articles absolutely, as he may deem expedient." It is to be observed that the bequest was to the nephew by name, and not as executor, although he was appointed executor in another part of the will.

The decision in *Wells v. Hawes*, 122 Mass. 97, has no bearing upon this case. There the real estate was devised absolutely to the person named in the will as executor, subject to no trust except so far as a trust might be held to be created by a power given in the will to sell the land if necessary to carry out the purposes of a memorandum left with him by the testatrix; and the only point decided or argued was, that there being no evidence either of such memorandum or of such necessity, a conveyance by him without license from the judge of probate afforded no defense to a real action brought by a creditor of his who had attached and levied upon the land.

Upon a review of the authorities, we find nothing in them to control the conclusion, based upon the intention which appears to us to be clearly manifested on the face of this will, that the executors take the estate, not beneficially, but in trust; and that the beneficiaries not being described by name or by class, the trust cannot be upheld unless its purposes are such as the law deems charitable.

The trust declared cannot be sustained as a charity. There is no restriction as to the objects of the trust, except that they must be "such persons, societies or institutions as they" (the trustees) "may consider most deserving." "Deserving" denotes worth or merit, without regard to condition or circumstances, and is in no sense of the word limited to persons in need of assistance, or to objects which come within the class of charitable uses.

A bequest for the relief of "deserving poor," or of "indigent

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but deserving" individuals, is a charitable bequest, not by force of the word "deserving," but in virtue of the word "poor" or "indigent," and would be equally charitable if the word "deserving" had been omitted. *Kendall v. Granger*, 5 Beav. 300, 303. So a bequest "for the education of deserving youths" is charitable, because it is for the promotion of education and learning. *Saltonstall v. Sanders*, 11 Allen, 446, 454. And possibly a bequest for "deserving literary men" might be held upon like grounds to be a charity. *Thompson v. Thompson*, 1 Coll. 381, 399.

Bequests for poor relations have been held to be charitable bequests, Boyle on Charities, 31-36, and cases cited; *Gillam v. Taylor*, L. R., 16 Eq. 581; *Attorney-General v. Northumberland*, 7 Ch. D. 745. But for "such relations" of the testator as are "most deserving" (without "poor" or any equivalent word) is not a charitable use; and includes all relations of the testator within a certain degree, because, as was observed by Sir JOSEPH Jekyll, M. R., a court of chancery has "no rule of judging of the merits of the testator's relations." *Doyley v. Attorney-General*, 4 Vin. Ab. Charitable Uses, C, pl. 16; s. c., 2 Eq. Cas. Ab. 194, pl. 15; 7 Ves. 58, note; *Harding v. Glyn*, 1 Atk. 469; *Burrough v. Philcox*, 5 Myl. & Cr. 72, 91, 93; *Salisbury v. Denton*, 3 K. & J. 529, 538.

There is a recent English case singularly in point. A testator by his will directed his trustees to pay the following legacies: "To the Cancer Hospital £100; to Brompton Hospital for Diseases of the Chest £100; to the Lord Mayor of Dublin for the time being £100 for such objects as he shall deem most deserving; to the Blind Asylum New Kent Road £100; to Mrs. Gladstone of No. 11 Carlton House Terrace to be applied as she thinks proper in charity, £200; and the residue of my estate I bequeath to my trustees for such objects as they consider deserving, whether in increase of the before-mentioned ones or otherwise." Vice-Chancellor WICKENS, a most accomplished equity judge, held that the bequest to the mayor of Dublin and the residuary gift could not be held to be limited to charitable objects, but failed altogether, on the ground of uncertainty. *Harris v. Du Pasquier*, 26 L. T. (N. S.) 689; s. c., 20 W. R. 668.

The other cases cited by the learned counsel for the defendants have no tendency to support this as a charitable bequest.

The case of Offley's Charity, described generally in 1 Cal. Pro. Ch. 216, and in Dwight's Charity Cases, 185, as of legacies "for

the benefit of apprentices and other inhabitants of the city of Chester," appears by the 31st Report of the Commissioners of Charities, 385, referred to by Mr. Dwight, to have been of money to be lent from time to time "to twenty-four young men free of the said city of Chester, of honest name and fame, occupied and inhabitants within the said city," twelve of whom to be "such as had served in that city for their freedom as apprentices," and the income derived from such loans to be devoted to poor persons and prisoners in that city; and thus within the very words of the Stat. of 43 Eliz., ch. 4, § 1, "for supportation, aid and help of young tradesmen and handicraftsmen," and for relief of "poor people" and of "prisoners." Duke on Charitable Uses (Bridgm. ed.), 1, 131; *Attorney-General v. Ironmongers' Co.*, Coop. Pract. Cas. 283; *Odell v. Odell*, 10 Allen, 1, 12; *Jackson v. Phillips*, 14 id. 539, 569, 570; *In re Prison Charities*, L. R., 16 Eq. 129.

In *West v. Knight*, 1 Ch. Cas. 134, in 1669, a bequest to a parish was objected to because it did not say to what use, "whether it were for the poor, or for repair of the church, or highways, etc.," and was upheld by Sir HARBOTTLE GRIMSTONE, M. R., and applied for the benefit of the poor of the parish. But that would seem to have been an application in the discretion of the court to one of several uses, all of which were charitable, in accordance with the rule laid down in an earlier case, published in Tothill twenty years before, that when no use is mentioned it shall be decreed to the use of the poor. *Fisher v. Hill*, Toth. 95; (2d ed.) 33; s. c., Duke, 484. And a bequest "for the use and benefit of said parish" has always been held in England to be a good charitable bequest. *Attorney-General v. Hotham*, Turn. & Russ. 209; *Attorney-General v. Webster*, L. R., 20 Eq. 483.

A gift to "widows and orphans" of a particular sect or parish, or to "widows and children of seamen" of a town, is good because the words clearly manifest an intention to relieve a class of persons under a common need of assistance, and coming within the spirit, if not within the letter, of the statute of Elizabeth, "relief of aged, impotent and poor people," "maintenance of sick and maimed soldiers and mariners," and "education and preferment of orphans." *Cook v. Duckenfield*, 2 Atk. 563; *Powell v. Attorney-General*, 3 Meriv. 48; *Attorney-General v. Comber*, 2 Sim. & Stu. 93. And in *Rogers v. Thomas*, 2 Keen, 8, in which Lord LANGDALE sustained a bequest "to the inhabitants of Tawleaven row in the

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parish of Sethney," it had been found by a master that the row consisted of seven houses which were entirely occupied by poor fishermen and laborers and their families.

In *Cook v. Duckenfield*, 2 Atk. 563, in *Paice v. Archbishop of Canterbury*, 14 Ves. 364, and in *Pocock v. Attorney-General*, 3 Ch. D. 342, the testator plainly manifested his intention to devote his property to charitable uses ; in the first case, by the words, " for such charitable uses and purposes as I shall direct by codicil or otherwise ;" in the second case, by the words, " all the remainders of my different bequests I give and bequeath in trust for charitable purposes ;" and in the third case, by the words, " to such charitable institutions as I shall by any future codicil give the same ;" and each case was decided upon that ground. 2 Atk. 569 ; 14 Ves. 371 ; 8 Ch. D. 346, 350 ; *Saltonstall v. Sanders*, 11 Allen, 458, 462.

A gift to charitable or public purposes is good. *Dolan v. Macdermot*, L. R., 3 Ch. 676. But if the trustees are authorized to apply or distribute it to other purposes or persons, it is void. *Chamberlain v. Stearns*, *Vezey v. Jamson*, and *Ellis v. Selby*, before cited.

The conclusion of the whole matter is, that the testatrix having given the residue of her property to her executors in trust, and not having defined the trust sufficiently to enable the court to execute it, the plaintiff, being her next of kin, is entitled to the residue by way of resulting trust.

Demurrer overruled.

NOTE BY THE REPORTER.—To same effect, *Adye v. Smith*, 44 Conn. 60 ; a. c., 38 Am. Rep. 424. In *Hasketh v. Murphy*, New Jersey Court of Chancery, February, 1882, a trust " to employ the annual income of the said moneys so invested, and from time to time to be invested for the relief of the most deserving poor of the city of Paterson aforesaid forever, without regard to color or sex ; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund," with a power of appointing and substituting trustees for those named, was held a valid charity.

Shurtleff v. Parker.

SHURTLEFF V. PARKER.

(130 Mass. 293.)

Slander and libel — unauthorized repetition — privileged communication.

One who utters a slander is not responsible for its unauthorized repetition.*
 A libellous letter written by a minister to an association of ministers of which he is not a member, concerning one of its members, is not privileged.†

ACTION for slander and libel. The count for slander was for words uttered by a clergyman at a meeting of his own church. The count for libel was for a letter written by the defendant to an association of ministers to which the plaintiff belonged, but to which the defendant did not belong. The defendant had judgment below.

F. P. Goulding & H. C. Hartwell, for plaintiff.

W. S. B. Hopkins & W. H. Atwood (*L. Wallace* with them), for defendant.

Soule, J. We are of opinion that the judge who presided at the trial in the Superior Court erred in his rulings on some material points, as to which the exceptions must be sustained; and that a part of the rulings excepted to were correct.

1. The questions and answers in the deposition were properly excluded. They had no tendency except to show that after the words complained of were spoken by the defendant, other persons repeated the statements which he made, and that they became the subject of discussion to a greater or less extent. There is nothing in the evidence to show that the defendant, when he uttered them in a meeting of his own church, authorized or intended any repetition of them by any of the persons present, and this being so, he is not answerable for any consequences which followed from such repetition or discussion. If the words were slanderous, the repetition under such circumstances gave an independent right of action against those who repeated them; but the fact that they were re-

* To same effect, *Gough v. Goldsmith*, (44 Vt. 262), 28 Am. Rep. 579.

† Compare *Shurtleff v. Stevens* (51 Vt. 501), 31 Am. Rep. 698, and note, 708; and *Maurice v. Worden*, (54 Md. 533), ante, 384. But a report of an investigating committee of an Odd Fellows Lodge was held *prima facie* privileged in *Kirkpatrick v. Eagle Lodge*, 26 Kans. 384.

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peated was not admissible for the purpose, either of showing malice on the part of the defendant, or of enhancing the damages to be recovered against him. *Hastings v. Stetson*, 126 Mass. 329 ; s. c., 30 Am. Rep. 683.

[Omitting a minor point.]

3. The ruling asked for by the plaintiff, that under the circumstances disclosed in proof the occasion of the publication of the alleged libel was not privileged, should have been given.

When the publication was made the plaintiff had ceased to have any connection with the Congregational Society at Shirley, and was not engaged in preaching anywhere. The defendant was not a member of the Windham Association of ministers, and had no other interest in it than that general interest which any good citizen would naturally feel in the welfare and wise management of any voluntary association purporting to be composed of minister of the Gospel. He had no further interest in the relation of the plaintiff to that association, and the continuance of his membership therein, than any other good citizen had, who was anxious that purity and freedom from suspicion should be maintained in the membership of all such associations. The person to whom the alleged libel was addressed was a member of the Windham Association, but the defendant, so far as appears, had no relations with or interest in him personally.

On these facts, no occasion of privilege exists. According to the well-established doctrine, the publication of defamatory matter is justified by the occasion when it is made, *bona fide*, on any subject matter in which the party making it has an interest, or in reference to which he has a duty to perform, if made to a person having a corresponding interest or duty. The defendant clearly owed no duty to the Windham Association, nor to the Rev. Dr. Stevens, to whom he wrote. He had no personal right or interest which would be protected by the removal of the plaintiff from the Windham Association, or by any action which that association might see fit to take with reference to the plaintiff. The communication may have been made from a laudable motive, but the law does not permit a mere volunteer to publish his opinions in defamation of another with impunity, simply because he means well in so doing. *Joannes v. Bennett*, 5 Allen, 169 ; *Krebs v. Oliver*, 12 Gray, 239 ; *Dale v. Harris*, 109 Mass. 193 ; *York v. Johnson*, 116 Mass. 482.

Exceptions sustained.

Barrett v. Dolan.

BARRETT v. DOLAN.

(180 Mass. 366.)

Civil damage act—death of husband.

Under the civil damage act, a wife cannot maintain an action for the death of her husband, caused by intoxicating liquor sold him by the defendant.*

ACTION by wife, under civil damage act, for death of husband by intoxicating liquor sold him by defendant. The defendant had judgment below.

J. E. Cotter & E. Davis, for plaintiff, cited *Jackson v. Brookins*, 5 Hun, 530; *Schneider v. Hossier*, 21 Ohio St. 98; *Hackett v. Smelsley*, 77 Ill. 109.

D. G. Hill & C. A. Mackintosh, for defendant.

LORD, J. The demurrer in this case was rightly sustained. There are insuperable objections to the maintenance of the action. The cause of action, as stated in each count, is the death of a husband. In this Commonwealth there is no right of action by any person for damages occasioned by causing the death of another. *Carey v. Berkshire Railroad*, 1 Cush. 475; *Shaw v. Boston & Worcester Railroad*, 8 Gray, 45, 80; *Kearney v. Boston & Worcester Railroad*, 9 Cush. 108; *Palfrey v. Portland, Saco & Portsmouth Railroad*, 4 Allen, 55. This proposition may certainly be deemed elementary.

There is nothing in the Stat. of 1879, ch. 297, which gives such right. The fact that the liability to pay damages for injuries sustained is created by statute, and does not exist at common law, does not give a claim for damages by reason of death. The liability to an action for damages occasioned by a defective highway is purely a statute liability, and did not exist under the common law; but no damages by reason of death have ever been recovered or claimed or supposed to be recoverable under it. So important a change in the law as the right to recover damages for the death of a person would not be left to implication. The value of a human life has never as yet been left in this Commonwealth to be estimated by a jury; and

* To the same effect, *Kirchner v. Meyers* (35 Ohio St. 85), 35 Am. Rep. 598, and note, 601
Contra: *Mead v. Strutton*, N. Y. Ct. App., Jan 1882, 25 Alb. Law. Jour. 128.

Curran v. Merchants' Manufacturing Company.

no attempt has ever been made to fix a money value to human life. Provision has been made for the punishment, in some cases, of the agent which involuntarily but wrongfully destroys life, and a pecuniary penalty has been affixed to the offense; but it has been limited, and the amount to be awarded is determined by the discretion of the court, and not by the judgment of a jury. The fact that such penalty has been imposed for the benefit of those who suffered the most injury from the death is a very strong indication on the part of the legislature of a determination not to have the value of human life the subject of litigation between parties beneficially interested in the life and those causing the death. And certainly the language of this statute precludes the possibility of a construction which would include death as among the injuries to be recovered for. A man may be at the same time in the employment of another, he may be a husband, and he may be the father of many children. Does a right of action belong to every one of them? And if the legislature had intended to include death among the causes of action, is it possible that the right to bring it would not have been confined to some person for the benefit of all? But we need not discuss this. It is sufficient to say that no such right exists at the common law, and none has been given by statute in Massachusetts.

Judgment affirmed.

CURRAN V. MERCHANTS' MANUFACTURING COMPANY.

(180 Mass. 874.)

Master and servant — negligence — infant — co-servant.

A boy fourteen years old, who had cleaned machinery two years and a half in a mill, was injured by a fellow servant's carelessly starting the machinery while he was cleaning it. No incompetency being shown in the fellow-servant, nor any carelessness in selecting him, *held*, that the injured party had no remedy against the master.*

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

G. Marston & J. W. Cummings, for plaintiff.

* See *Blake v. Me. Cent. R. Co.* (70 Me. 60), 35 Am. Rep. 297.

Curran v. Merchants' Manufacturing Company.

A. J. Jennings (J. M. Morton, Jr., with him), for defendant.

Soule, J. The plaintiff in the first count of his declaration alleges that he was injured because the defendant, his employer, managed its machinery so negligently and carelessly that it was unsafe and dangerous. In the second count he alleges that he was taken from the work for which he was employed and set to cleaning out the gearing of a mule frame, which was an unusual employment for him in which he was not instructed or skilled, and was to be attended to in an unusual place for him to work; that the gearing was still and in a safe condition for him to work on it, but while he was so at work it was carelessly and negligently set in motion by the defendant, and his hand was hurt; and that the defendant knowingly and carelessly employed unskilful, inexperienced and incompetent overseers or men in charge by whose act the machinery was set in motion.

It is clear therefore that the action does not proceed on the ground that the machinery was unsuitable for the purpose for which it was intended, nor that it was not in good running order. The foundation of the action is negligence on the part of the defendant in managing its machinery, the only negligence specifically stated being in knowingly and carelessly employing unskilful and incompetent overseers or men in charge by whose act the machinery was started.

It is familiar and well-settled law in this Commonwealth that an employer is not liable to his servant for injuries caused by the negligence of a fellow-servant. The plaintiff was evidently aware of this principle and inserted the allegation that the defendant knowingly and carelessly employed unskilful and incompetent overseers, in the hope of bringing his case within the other principle of law which imposes on employers the duty to his servants not to employ as their fellow-servants persons who are known to be unskilful and incompetent, when such want of skill and ability may expose the servants to danger of bodily injury which would not exist if skilled persons only were employed as their fellow-servants.

The only question presented by these exceptions therefore is, whether there was any evidence which would warrant a jury in finding that the defendant did knowingly and carelessly employ incompetent overseers or persons in charge, and that the injury to the plaintiff resulted from such employment. We are of opinion that there was none. There was nothing to show that Richard Smith

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was incompetent for the position of overseer, that James Smith was incompetent for the place of second hand, or that Cox was not fit to be promoted from the place of back-boy to that of spinner. It appears that Richard Smith had been in authority in the mill during the whole of the two and a half years of the plaintiff's employment there; that James had been a spinner before he was made second hand, and that second hands are made by the promotion of spinners, and that Cox had been doing boys' work before he was made a spinner, and there was no evidence whatever tending to show or which the plaintiff contended had any tendency to show, that either of these persons, who were the only persons employed in the room where the plaintiff worked at the time of the accident, had ever shown any lack of skill or efficiency in the performance of the duties of their respective positions before the accident occurred in which the plaintiff was hurt.

It was contended at the argument that the case was taken out of the ordinary line of cases in which the servant is an adult by the fact that the plaintiff, who was fourteen and a half years of age and had worked in the mill two and a half years, was of tender years and was set to work in an unusual place, doing what he was not accustomed to do. But the evidence was that the work he was doing was precisely like what he had been accustomed to do from time to time during the whole term of his employment by the defendant, and that his injury did not proceed from the fact that he was working in dangerous proximity to other machinery over which he had no control. This case has no similarity therefore in this respect to that of *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; s. c., 3 Am. Rep. 506, on which the plaintiff relied.

Exceptions overruled.

JONES V. DEXTER.

(130 Mass. 380.)

Partnership—partner secretly buying assets on dissolution.

The assets of a partnership were sold, on dissolution, at public auction, to a person who subsequently conveyed them to one of the partners, in pursuance of a secret arrangement made before the sale. The other partner was also present and bid. *Held*, that the purchasing partner must account to the other therefor, as if no sale had taken place. (See note, p. 461.)

BILL to settle a partnership. The second paragraph of the opinion and the head-note state the facts. The plaintiff had judgment below.

T. M. Stetson & L. L. Holmes, for plaintiff.

C. W. Clifford, for defendant Dexter.

SOULE, J. The general rule is familiar, that a trustee will not be permitted to make a profit out of the trust property; and that if he purchases it, even at a public auction, he will hold it for the benefit of the *cestui que trust*, and if any profit is made upon it, he must account for it as a trustee. Perry on Trusts, § 427. This rule applies to cases where one deals with property as agent for another, and to all those cases in which confidence is reposed, and one has it in his power, in a secret manner, for his own advantage to sacrifice the interests which have been intrusted to him. Story Eq. Jur., § 323. In all such cases, the *cestui que trust* has his election to avoid the transaction which was intended to benefit the trustee, and to treat the subject-matter of the trust as if no change had been made in its situation, so long as the trustee has not disposed of the property to a *bona fide* holder for value. *Wyman v. Hooper*, 2 Gray, 141.

The application of this principle to the case at bar is plain. The defendant Dexter was acting for himself and his former partner, and the assignee in bankruptcy of his partner, in closing up the affairs of the partnership. When he undertook to sell the interest of the partnership in the Ocean Rover and its outfits and catchings, he had no right, as against the other parties in interest, to make a secret arrangement by which a stranger should purchase the interest for him. And when the purchase was made in accordance with that secret arrangement, and the interest, after being conveyed to the purchaser, was conveyed by him to Dexter in pursuance of the secret arrangement, Dexter held it for the benefit of the partnership, and not for his personal benefit.

We have assumed, in what we have said, that such secret arrangement was made and acted on, because we are of opinion that the agreed facts and evidence call for a finding to that effect. Such finding is a sufficient foundation for a decree against the defendants.

It has already been decided, that inasmuch as the debts which the plaintiff owed when he went into insolvency have been paid,

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and his assignee in insolvency disclaims all interest in the subject matter of the suit, and assents to the maintenance of the bill, the plaintiff, if any one, is entitled to the relief asked for. *Jones v. Dexter*, 125 Mass. 469. The result is that the decree appealed from must be affirmed.

Affirmed.

NOTE BY THE REPORTER.—In *Platt v. Platt*, 2 N. Y. Sup. Ct. 39, it was said: "In their dealings with each other partners occupy a position of trust. They are held to the utmost good faith; a purer and more elevated morality is demanded of them than the common morality of trade, and the standard by which they are tried in a court of equity is far higher than 'the standard of the world.'" That was a case of very clear and gross fraud. The partners were brothers, and one becoming sick and mentally enfeebled, was persuaded by the other to sell out to him. The vendee made out a false balance sheet, by means of which the vendor was induced to believe his interest to be worth much less than it was really worth, and to accept a corresponding amount. The language of the court was not the enunciation of a new principle, and the doctrine is not confined to cases of gross fraud. Parsons says: "Not only gross fraud, but transactions of a more plausible nature, such as intrigues for private benefit, are clearly offenses against the partnership at large, and as such, are relievable in a court of equity." "The first and highest duty which partners owe to each other is that of perfect good faith." "Partners are in the power or at the mercy of each other, and there seems to be no relation in life, calling either by its own exigencies or by the rules of law for a more absolute good faith than the relation of partnership." To reduce this general principle to practical details, it may be said, first, one partner cannot carry on any other business to the injury of the partnership business; second, one partner cannot make private bargains with third parties for his own benefit, which either inflict a loss upon the partnership or turn to himself advantages which belong to all in common; third, one partner cannot sell to his own firm, at a profit, goods which he also buys and sells on his own account; fourth, one partner cannot acquire to himself a renewal of a partnership lease or other privilege about to expire; fifth, one partner cannot occupy a position which may even give him a bias against the interests of his partnership. In *Fawcett v. Whitehouse*, for instance, Knight & Co., being partners and proprietors of iron works, and finding the trade unprofitable, employed Whitehouse to find a capitalist to take the property off their hands. He prevailed on Fawcett and Shaw to join him in carrying on the concern in partnership, and a lease was taken accordingly. Immediately thereafter Whitehouse received from Knight & Co. £12,000, for the pretended purpose of enabling him to advance the necessary capital for the new concern, but in reality for his services in procuring responsible tenants for the premises. It was at first a loan, but afterward converted into a gift. The transaction was concealed from the plaintiffs, and they did not learn of it until Whitehouse's retirement, three years after. They then filed a bill praying that as to two-thirds of the £12,000 Whitehouse be declared a trustee for them. The relief was granted, Lord LYNDBURST observing that if one partner acts as an agent for the others, and stipulates for a private advantage for himself, he shall not have the benefit of such a stipulation, and that the transaction in question amounted to a fraud.

Again, in *Dunlop v. Richards*, 2 E. D. Smith, 181, it was held that a person cannot be agent for both purchaser and seller, and earn a compensation from each, unless by distinct arrangement between all concerned, and that when two persons agree to share the profits of a contemplated purchase, one of them may not receive for his separate private use a commission from the seller. So to take and apply it would be a fraud upon his associates.

In *Burton v. Wookey*, 3 Madd. & Geld. 367, the parties formed a partnership to deal in *lapis calaminaris*, or silicate of zinc. The defendant, who was a shop-keeper, was to take the active part in the business, and to purchase the articles from the miners, in whose neighborhood he lived. Instead of paying the miners in money, he paid them in goods

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from his store, and in his account with the plaintiff charged him as for cash paid, to the amount of the price of the goods. It was held that he must account to the plaintiff for the profit that he made on his goods.

The fact that the goods are worth what the partner charges his partnership for them, and that the partnership could not get them cheaper from any one else, is immaterial. The vendor is not bound to supply his partnership, but if he does he must do so without profit. He is a trustee, and no trustee is permitted to deal in the trust property at a profit to himself. See *Bentley v. Craven*, 18 Beav. 75.

The prohibition against deception is not confined to active and affirmative misrepresentation. One "cannot deceive his partners for his benefit and their injury, either by false representation, or by concealments." Parsons on Part * 225.

The principle in question is expressed by Lord CRANWORTH in *Aberdeen Railway Co. v. Blaikie*, 1 Macq. Ap. Cas. 461, in the House of Lords: "It is a rule of universal application that no one having duties of a fiduciary character to discharge shall be allowed to enter into engagements in which he has, or can have, any personal interest conflicting, or which may conflict, with the interests of those whom he is bound to protect."

In *Manuf. Nat. Bk. of Troy v. Cox*, 2 Hun, 592, Cox, the defendants' intestate, and plaintiff's assignors were engaged, as partners, in the stove business at Troy. Cox purchased, for the benefit of the firm, from Brown, the right to use, in the manufacture of stoves, an improvement patented by him, upon the payment of one dollar for every stove manufactured. The firm were also authorized to sell the right to any stove manufacturers, having their head-quarters at Troy. In pursuance of this agreement, the firm paid to Brown some \$11,000. At the same time, Cox, without the knowledge of his co-partners, agreed with Brown to use his influence to introduce and bring into general use the improvement, not only at Troy, but elsewhere, for which services he was to receive one-half of the moneys paid to Brown. It did not appear that Cox rendered any service under this arrangement. But in pursuance of it, he received from Brown one-half of the money paid by the firm to him. After the dissolution of the firm, the surviving partners learned of this secret agreement, and this action was brought to compel an accounting for the moneys so received. Held, that Cox, by entering into this agreement with Brown, engaged in a business which necessarily conflicted with the interests which he had in common with his associates; that such business thereby became part of the business of the firm; and that he was liable to account to his co-partners for their proportionate share of the profits he realized. The court observed: "Although it appears that no actual injury resulted to the firm, yet I think the arrangement entered into between the intestate and Brown, if it had been carried into effect, may well have tended to deprive the partnership of profits which otherwise might have been realized." "If such was the fact, then it remains to be considered whether there was not a violation of the obligation due from one partner to his associates, which made the intestate liable for the profits to his co-partners. The principles upon which the relationship of partners is founded are strict and exacting, demanding entire good faith toward each other, and the highest standard of morality, integrity and fair dealing. They occupy a position of trust and confidence far above the ordinary standard of trade morality, in their dealings with each other. They are both trustees and agents, and have no right to deprive the partnership of any portion of their capital, diligence, skill and industry, by engaging in any other kind of business. These principles are familiar and well settled. But above all, they are not allowed to engage in any other business, which gives them an interest adverse to that of the firm. Nor can one of them make a profit, privately, by dealing with himself, or clandestinely carry on another trade or business, which may prove injurious to the interest of the co-partnership. It cannot be doubted, I think, that the intestate, by his secret arrangement with Brown, by which he was to reap an advantage, was engaged in a business which necessarily conflicted with the interests which he held in common with his associates, and which, if the agreement had been fulfilled, might have seriously affected their profits; and although he did no act which produced any such results, yet as he had violated his obligation and duty, the business upon which he had thus entered became a part and parcel of the business of the firm, and he was liable to account to his co-partners for their proportionate share of the profits he realized. It is sufficient, I think, that he violated the princi-

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ples which should have controlled his action, thus to render him liable, even although the proof fails to show any direct loss to the firm by means thereof." This holding was affirmed, 59 N. Y. 659.

This principle is illustrated in the familiar doctrine that one partner during the partnership cannot secretly obtain to himself a lease of the premises where the business is carried on. *Struthers v. Pearce*, 51 N. Y. 337.

STURGES V. THEOLOGICAL EDUCATION SOCIETY.

(130 Mass. 414.)

Negligence — owner's liability for contractor's.

Defendant employed a contractor to build a drain from the cellar of its building to the common sewer. It was necessary to cut through a plank barrier which had been constructed beneath the surface of the street to prevent the tide from flowing into cellars in that locality. The contractor so negligently performed this part of his work that the tide-water flowed through the opening made by him into the cellar of a building owned by plaintiff, adjoining that of defendant. *Held*, that defendant was liable for the injury done by the tide-water to plaintiff's premises. (*See note*, p. 464).

ACTION for injury to real estate by negligence. The opinion states the case. The defendant had judgment below.

S. J. Thomas & C. P. Sampson, for plaintiff.

O. W. Holmes, Jr., for defendant.

MORTON J. The declaration alleges that the defendant, being the owner of the building adjoining that occupied by the plaintiff, undertook to construct a drain from its cellar into the common sewer in North street in Boston, and negligently performed the work, and thus caused tide-water to flow into the cellar of the plaintiff. The block of buildings in which the two cellars are situated was surrounded by a plank barrier constructed beneath the surface of the street to prevent the tide from flowing into the cellars. It was necessary to construct the drain from the defendant's cellar through this barrier in order to reach the common sewer. The defendant employed one Collins to do the work; and the evidence tended to show that he did the work negligently and improperly, so that after he had finished the work, the tide flowed through the opening made in the barrier and through the defendant's cellar into the

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cellar of the plaintiff. Assuming, as the evidence tends to show, that Collins' relation to the defendant was that of a contractor, and not of a mere servant, the question is whether the defendant is liable for injuries caused by the improper construction of the drain.

The owner of a building, who has used due care in the employment of an independent contractor, is not responsible to third persons for the negligence of the latter, occurring in his own work in the performance of the contract, such as the handling of tools or materials, or providing temporary safeguards while doing the work. *Hilliard v. Richardson*, 3 Gray 349; *Connors v. Hennessey*, 112 Mass. 96; *Gorham v. Gross*, 125 id. 232; s. c., 28 Am. Rep. 224; *Butler v. Hunter*, 7 H. & N. 826. As to such matters, pertaining to the mode in which he does the work, he is not the servant of the owner. But where the thing contracted to be done from its nature creates a nuisance, or where, being improperly done, it creates a nuisance and causes mischief to a third person, the employer is liable for it. *Gorham v. Gross*, *ubi supra*, and cases cited.

In the case at bar, the defendant had the right to make an opening through the barrier for the purpose of laying a drain, but it was its duty to close it securely so that the cellar should be protected from the tide. Having employed an independent contractor, it is not responsible for his negligent acts while doing the work, because in respect to such acts he is not its servant; but if the work after it was done created a nuisance, and caused injury to the plaintiff, it is responsible. The jury would have been authorized in finding that the cause of the plaintiff's injury was the failure of the defendant to make the barrier tight after laying the drain. It was its duty to do this, and it cannot shield itself from responsibility by showing that it employed a contractor to do the work who was negligent. The mischief to the plaintiff is the result of the neglect of the defendant to perform its duty. We are therefore of opinion that the case should have been submitted to the jury.

As a new trial must be granted on this ground, it is not necessary to consider whether there was any evidence of negligence on the part of the defendant in employing an incompetent contractor.

New trial ordered.

NOTE BY THE REPORTER.—This decision is supported by *Percival v. Hughes*, Eng. Court App. 46 L. T. (N. S.) 677.

The plaintiff was the owner of a house adjoining the defendant's, and separated from it by a party wall, B. was owner of another house adjoining the defendant's, and also separated from it by a party-wall, and these two party walls were connected together by

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cross-girders. The defendant entered into a contract with a competent architect and competent contractors to pull down his house and to rebuild it, making it a story higher, and constructing a cellar underneath it. The house was accordingly pulled down and rebuilt, and the necessary operations of underpinning the party-walls, altering the joists, connecting them, etc., successfully carried out. When the house was very nearly completed, a staircase, not included in the specification, was being made from the ground floor to the basement. The workmen were expressly told not to cut into the party-wall between defendant's and B.'s premises. They however cut into the lower part of it and made holes in it, and in consequence it fell down the same night. The cross-girder was torn from the party-wall between the plaintiff's and defendant's houses and the wall injured. *Held*, (HOLKER, L.J., dissenting), that the defendant was liable to the plaintiff for the damage so caused. By BAGGALLAY and BRETT, L.JJ.: The taking down and rebuilding of the house being likely to cause injury to the plaintiff's house, the defendant was liable for the negligent acts and omissions, during the whole period of pulling down and rebuilding, of any one engaged in the work. The making of the staircase was a part of the whole work. By HOLKER, L.J.: The part of the work which was likely to cause injury to the plaintiff's house having been successfully accomplished, and the making of the staircase not being in itself dangerous to the plaintiff's house, the defendant was not liable for the injury caused by the workmen's disobedience to orders. Judgment of Lord COLERIDGE, L.C.J., MANISTY and BOWEN, JJ. affirmed,

WELD V. WALKER.

(130 Mass. 422.)

Burial — right of husband as to wife's interment.

If a husband consented to the burial of his wife in a lot owned by another, but not freely, nor with the intention or understanding that it should be permanent, a court of equity may permit him to remove her body, and the coffin and tombstones furnished by him, to his own land, and may restrain interference with such removal. (*See note, p. 467.*)

BILL for permission to remove a dead body, etc. The opinion states the case. The complainant had judgment below.

R. I. Burbank & R. Lund, for plaintiff.

I. T. Drew, for Walker.

W. Gaston & C. L. B. Whitney, for corporation.

GRAY, C. J. The rules of law applicable to this case are too well settled to require or permit elaborate discussion. Neither the husband nor the next of kin have, strictly speaking, any right of property in a dead body; but controversies between them as to the place of its burial are in this country, where there are no ecclesiastical courts, within the jurisdiction of a court of equity.

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2 Bl. Com. 429; *Meagher v. Driscoll*, 99 Mass. 281; *In re Beekman Street*, 4 Bradf. 503, 532; *Pierce v. Swan Point Cemetery*, 10 R. l. 227; s. c., 14 Am. Rep. 667. It is the husband's right and duty to bury his deceased wife. *Durell v. Hayward*, 9 Gray, 248; *Lakin v. Ames*, 10 Cush. 198, 221; *Cunningham v. Reardon*, 98 Mass. 538. When a body has once been buried, no one has the right to remove it without the consent of the owner of the grave, or leave of the proper ecclesiastical, municipal or judicial authority. *Regina v. Sharpe*, Dearsly & Bell, 160, 163; s. c., 7 Cox C. C. 214, 216; *Wynkoop v. Wynkoop*, 42 Penn. St. 293; *Pierce v. Swan Point Cemetery*, above cited.

The present case was heard before a justice of this court on bill, answer, replication and proofs; no objection was made to the form of the bill, by demurrer or otherwise; and the evidence taken at the hearing has not been reported. The only question before us on the appeal therefore is, whether the decree for the plaintiff is warranted by the frame of the bill. *O'Hare v. Downing*, 130 Mass. 16.

The husband in his bill alleges, in substance, that two days after the death of his wife he consented to her burial, in a coffin and grave-clothes procured by himself, in a lot in the cemetery of the defendant corporation, owned by the husbands of two sisters of his wife; that he consented to such burial while in great distress of mind, and worn out by taking care of his wife during her last illness, and yielding to continued importunities of the sisters and of the husband of one of them, much against his own wishes and feelings, "fearing that they would make trouble for him if he did not consent," and "which he should not have done had his mind been in condition to realize the situation;" that he has no right or authority to take care of or adorn her grave in that lot, or to bury others of his or her family or friends there, or to be buried himself by her side; that he owns jointly with his co-heirs a lot in the Mount Hope Cemetery, in which lot his father and mother are buried, and in which he wishes that his late wife, and himself at his death, may be laid; that he desires to remove to this lot her remains, with the coffin containing them and the stones and monuments placed by him at her grave, and has obtained a permit in due form from the proper board of health for that purpose; that he has requested of the defendants permission to do so in a careful and proper manner, doing no damage to the lot in which she is

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now deposited, and leaving that lot in good condition ; and that they have refused such permission.

Upon these allegations, if supported by evidence (which on this record we are bound to presume), we are all of opinion that it was within the authority of the justice before whom the hearing was had to decide that the plaintiff never freely consented to the burial of his wife in the lot of her brothers-in-law, with the intention or understanding that it should be her final resting-place; and that a case was made out on which a Court of Chancery, in the exercise of its undoubted jurisdiction, might order the defendants to permit him to remove her body, coffin and tombstones to the lot owned by himself and his kindred.

Decree affirmed.

NOTE BY THE REPORTER. — In *Fox v. Gordon*, Penn. Common Pleas, the bill set forth the following facts : On January 28, 1878, Marie G. Fox, the daughter of plaintiff, died at the house of the plaintiff. The defendant, who was the mother of the plaintiff's wife, requested that the funeral of the said Marie might take place from her house : that the plaintiff, at the desire of his wife, acceded to his request. The funeral accordingly took place from the said house, and the child was buried in a lot in Laurel Hill Cemetery, owned by George Gordon, the husband of the defendant, who has since died, leaving the defendant, his executrix, and bequeathing to her the said lot. The burial in the aforesaid lot in Laurel Hill Cemetery was without consultation with the complainant. At the time of the death of her child the plaintiff and his wife were much exhausted, having nursed their child through her illness. Immediately after the funeral, Sallie G. Fox, the wife of the plaintiff, became ill at the house of her mother, the defendant, and remained there until her death, which occurred shortly after her child's funeral. At the time of her death the plaintiff's condition, mentally and physically, was still more reduced, and while in that condition the body of his said wife was also interred by the defendant in Laurel Hill Cemetery, in the same lot with her child, without the request of, or consultation with, the plaintiff. Personal effects of said Sallie G. Fox, of a value sufficient to cover the funeral expenses, were retained by the said George Gordon. The plaintiff remained ill for three months after the death of his wife, and immediately upon his recovery offered to repay to the said George Gordon the expenses incurred in the burial of his wife and expressed to Gordon a desire to remove the same to a lot of his own in Mount Peace Cemetery, where the remains of George G. Fox, his only other child, were interred. Mr. Gordon declined to accept such repayment, but expressed his willingness to allow such removal whenever the plaintiff should so desire. The plaintiff afterward offered to make such repayment to the said Maria F. Gordon, the defendant, on being permitted to remove said bodies, which offer was declined. The bill prayed : (1) A decree that the plaintiff have permission to remove the bodies of his wife and child from Laurel Hill to Mount Peace Cemetery. (2) Maria F. Gordon and the Laurel Hill Cemetery Company be enjoined from preventing or interfering with such removal. The defendant, Mrs. Gordon, demurred. The court overruled the demurrer. The principal case was cited on the argument.

Reed v. Home Savings Bank.

REED V. HOME SAVINGS BANK.

(130 Mass. 443.)

Corporation — malicious prosecution.

A savings bank is liable to an action for malicious prosecution.*

ACTION for malicious prosecution. The opinion states the point. The defendant had judgment below.

C. R. Train & J. O. Teele, for defendant.

F. S. Hessel tine, for plaintiff.

LORD, J. It is too late to discuss the question, once much debated, whether a corporation can commit a trespass, or is liable in an action on the case, or subject generally to actions of tort as individuals are. The books of reports for a quarter of a century show that a very large proportion of actions of this nature, both for non-feasance and for misfeasance, are against corporations.

It was contended at the argument, that an action for malicious prosecution so differs from other actions that it cannot be maintained against a corporation. But although in order to maintain such an action, both malice and want of probable cause must be found, yet proof of want of probable cause will warrant the jury in inferring malice. *Mitchell v. Jenkins*, 5 B. & Ad. 588; s. c., 2 Nev. & Man. 301; *Stewart v. Sonneborn*, 98 U. S. 187; *Stone v. Crocker*, 24 Pick. 81; *Ripley v. McBarron*, 125 Mass. 272. And by the great weight of modern authority, a corporation may be liable even when a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation; as in actions for fraudulent representations, *National Exchange Co. v. Drew*, 2 Macq. 103; *New Brunswick & Canada Railway v. Conybeare*, 9 H. L. Cas. 711, 738, 740; *Barwick v. English Joint Stock Bank*, L. R., 2 Ex. 259; for libel, *Philadelphia, Wilmington & Baltimore Railroad v. Quigley*, 21 How. 202; *Whitfield v. South-eastern Railway*, E. B. & E. 115; or for malicious prosecution, *Vance v. Erie Railway*, 3 Vroom, 334;

* To same effect, *Williams v. Planters' Ins Co.* (57 Miss. 759), 34 Am. Rep. 494, and note, 496.

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Copley v. Grover & Baker Co. 2 Woods, 494; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Carter v. Howe Machine Co.*, 51 Md. 290; s. c., 34 Am. Rep. 311; *Wheless v. Second National Bank*, 1 Baxter, 469; *Williams v. Planters' Ins. Co.*, 57 Miss. 759; s. c., 34 Am. Rep. 494; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *Walker v. South-eastern Railway*, L. R., 5 C. P. 640; *Edwards v. Midland Railway*, 6 Q. B. D. 287.

It was further contended, that although certain corporations might be liable to this action, such as business and trading corporations, which are often involved in litigation, savings banks, from their peculiar character and purposes, cannot be subject to such suit. The argument is, that they are not business or trading corporations, but are rather trustees administering upon the property of those who stand in the relation of *cestuis que trust*, from motives of kindness and charity, and not for the purpose of gain. If we assume all this to be true, morally speaking, it does not affect the legal *status* of the corporation. Their powers and their duties are defined by their charters, and the rights and the duties are legal rights and duties, to be enforced by the ordinary rules of law. A depositor in a savings bank becomes a creditor of that bank as really and as effectually as a depositor in a bank of discount or deposit. There is no relation of trustee and *cestui que trust* between bank and depositor, any more than in any other case of debtor and creditor. It is rather in form than in substance that a depositor in a savings bank differs from a stockholder in a business corporation. In each case, the money is intrusted to the corporation, to be managed by it for the benefit of the one who thus places it there; but by their charters, savings banks are required to make only such uses of the funds intrusted to them as shall, with care and prudence, preserve them from the perils and vicissitudes of trade. But in all the essential features of their organization, savings banks are, like all other corporations, creations of the law for the more convenient transaction of business to be done by them. They are capable of corporate action, and like all other corporations, are liable for their corporate action. In their conduct toward the public they owe the same duty to the public that other corporations owe. In their conduct toward individuals, they owe the same duty to individuals that other corporations owe. If a savings bank owns its banking-house, the same duties in relation to it exist as exist in a bank of deposit owning its own banking-house. It can no more permit a

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dangerous pitfall or a dangerous obstruction to exist upon its land to the injury of another, than can any other corporation or an individual. In its business transactions with individuals, it is subject to the same rules of law as other corporations or individuals. Its contracts may be impeached for fraud, as the contracts of other parties may be impeached for fraud ; or may be void for illegality, as the contracts of other parties are void for illegality ; and we see no ground upon which we can distinguish its corporate liabilities from those of other corporations, and therefore no reason why this action cannot be maintained against the defendant corporation.

Of course, we have before us no question of evidence, or of its sufficiency to maintain the action, but simply the question whether, if the proof is sufficient to show that the defendant as a corporation did all the acts which in an individual would create the liability, such liability would exist in the corporation.

New trial ordered.

McKIM V. AULBACH.

(130 Mass. 481)

Evidence — parol — instrument signed by two executors.

Where two executors sign a release of a mortgage, parol evidence is competent to show that only one had the money.

SUIT on a probate bond. The opinion states the case.

J. G. Abbott (B. Dean with him,) for plaintiff.

A. Russ and D. A. Door, for defendant.

COLT, J. The defendant is sued upon a probate bond, given by him as one of two executors. A judgment having been ordered for the penalty of the bond, the question before us is how much of the penalty is due in equity and good conscience, for which an execution should be awarded. Several breaches of the bond are assigned. Upon two of these, namely, the failure to file an inventory, and the failure to render an account within a year, the defendant is liable for nominal damages.

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The principal question arises on an alleged breach by the defendant, in negligently permitting his co-executor Wellbrock to appropriate the personal estate of the testator to his own use, whereby it was lost. The bonds given by the two executors were several and not joint, and neither is liable for losses caused exclusively by the default of the other. In order to charge the defendant, the burden is on the plaintiff to show, that in the administration of the estate, the defendant was negligent in the performance of some duty which the law devolves upon him personally. *Austin v. Moore*, 7 Metc. 116, 124.

A mortgage due to the testator, in the State of Ohio, which by his will the executors were authorized to collect and invest as they might judge to be for the interest of the estate, was collected upon a joint release and discharge, signed by both executors, which was forwarded to the mortgagor through an express company. The money when returned by the express company was received by the co-executor Wellbrock without the defendants' knowledge, and deposited by him in a savings bank in good standing, partly in his own name and partly in his name as trustee. He afterward took the money from the bank without the knowledge of the defendant, and it was lost to the estate by his misappropriation of it. It is sought to charge the defendant for the loss of this money.

The report finds that Wellbrock had almost exclusive management of the estate; that he was a neighbor and friend of the testator, and had relations more intimate than the defendant with parties interested under the will; and that the defendant was not familiar with laws and forms of business, or with the English language, and was content to leave the business in the hands of his co-executor. It appears that the defendant accounted for all the estate which actually came into his individual possession. In their first account, which was filed, assented to by the parties in interest, and allowed, after the mortgage was collected, the executors charged themselves with the amount paid thereon; and in a few days after it was allowed, the defendant resigned his trust. Two other accounts were afterward filed by Wellbrock, the remaining executor, which were assented to by the parties in interest, by which he charged himself with the amount collected on the Ohio mortgage.

It was the right of each executor to receive and hold the funds of the estate. *Edmonds v. Crenshaw*, 14 Pet. 166. Neither can be held responsible for the waste or misconduct of the other, unless

there be some act or agreement, on the part of the one sought to be charged, by which the estate has gone into, or has been negligently suffered to remain in, the exclusive possession and control of the one by whose misconduct the loss occurs. Thus both were held liable in a case where money was delivered to one executor, and immediately handed over to the other, who appropriated it to his own use. *Langford v. Gascoyne*, 11 Ves. 333. But an executor is not held any further than he is shown to have participated in the misappropriation. "Merely permitting his co-executor to possess the assets, without going further and concurring in the application of them, does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts, and what he receives and applies, unless he joins in the direction and misapplication of the assets." *Peter v. Beverly*, 10 Pet. 532, 562; *Brazier v. Clark*, 5 Pick. 96. 104; *Sterrett's Appeal*, 2 Penn. 419.

It is contended that the defendant is liable in this case because he must be treated as having concurred in the wrong by joining in the release by which his co-executor was enabled to obtain possession of the money due on the mortgage and to mingle it with his own property. The rules which govern the liability of co-executors follow in most respects the rules which prevail as to co-trustees. But while the latter are not liable for the money which they have not received, although they join in receipts given for the same, it was at one time held that the former were liable in such cases. The reason given for this distinction was that co-executors, unlike co-trustees, have each an independent power over the personal property of the testator, and may dispose of it, receive, pay and give receipts in their own names, and therefore that if one joins with his co-executor in giving a receipt he does an unmeaning act, unless he intends to render himself jointly answerable for the money. But this rule, which does not seem to have been maintained with entire uniformity, is declared in *Williams on Executors* (6th Am. ed.), 1938, to have been greatly relaxed in favor of executors; and Lord ELDON in *Shipbrook v. Hinchinbrook*, 16 Ves. 478, declares it to have been broken down.

In *Joy v. Campbell*, 1 Sch. & Lef. 328, 341, Lord REDESDALE states the distinction thus: "If a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving." "The true question in all those cases seems to have been, whether the money was under the control of both executors."

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If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it amounted to a direction to pay his co-executor;" "he became responsible for the application of the money just as if he had received it." In *Hovey v. Blakeman*, 4 Ves. 596, 608, Lord ALVANLEY, the master of the rolls, referring to the earlier rule, declared that he would not consider the fact that an executor joins in the receipt as absolutely conclusive; and in *Scurfield v. Howes*, 3 Bro. Ch. 91, he stated his dissent from the rule when an executor joins in signing a receipt, if it appears that he joined for conformity only. In *M'Nair's Appeal*, 4 Rawl. 148, 157, the Supreme Court of Pennsylvania declares that "there is no good reason for making executors or administrators liable more than trustees for moneys which they have never actually received, merely because they have joined in a receipt with the co-executor or co-administrator who did receive it. The receipt when proved must always be considered *prima facie* evidence against each of the signers that he received the money; and if he wishes to avoid the consequent liability, it will lie upon him to prove that it was not received by him." The weight of modern authority, both English and American, is that a joint receipt is only presumptive evidence that the money came into the possession or under the control of both. *Monell v. Monell*, 5 Johns. Ch. 283. And this presumption may be rebutted by proof that the money was in fact received by one and that the other joined only as a matter of form and for the sake of conformity. See also *Manahan v. Gibbons*, 19 Johns. 427; *Ochiltree v. Wright*, 1 Dev. & Bat. Eq. 336; Perry on Trusts, §§ 421-426.

It is further contended that even if the defendant cannot be charged upon the ground of his having joined in the release of the mortgage, and having allowed the money due thereon to be collected and deposited by Wellbrock alone, yet that the finding of the master in favor of the plaintiff is supported by the facts stated in the report, that in April, 1873, within a month after Wellbrock received and deposited the money, and before the greater part of it had been drawn out again by him, "either the defendant was warned and put on his guard as testified to by one of the parties in interest, or his suspicions were aroused;" and that "since that, whereas before that time receipts for rent had been given in the name of Wellbrock alone, he insisted that thereafter they should be signed by both of the executors."

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But this statement of the master is too meagre and ambiguous to enable us to come to a satisfactory conclusion on this branch of the case; and for the purpose of a fuller and clearer ascertaining and statement of the facts and circumstances relied on to charge the defendant by reason of negligence and breach of duty on his part since the original receipt and deposit of the money by Wellbrock, the case must be

Recommended to the master.

FIRST NATIONAL BANK OF PETERBOROUGH V. CHILDS.

(120 Mass. 512.)

Bank—National — forfeiture for usury — limitations.

In an action in a State court by a National bank upon a note upon which the bank has received usurious interest, the defendant may set off the forfeiture provided by the National Bank act, although the suit is in another State than that where the note was discounted, and more than two years after the discount. (*See note, p.477.*)

ACTION by a National bank of New Hampshire on a promissory note made in that State. Defense, the receiving of usurious interest by the bank on the discount.

A. De Wolf, for plaintiff.

C. C. Conant, for defendants.

Soule, J. The plaintiff corporation is a creature of the statutes of the United States, and its powers, rights and liabilities are governed by those statutes. Among the provisions therein contained are the following:

“Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or District where the bank is located, and no more.” U. S. Rev. St., § 5197.

“The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the

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note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." § 5198.

The rate of interest allowed by the laws of the State of New Hampshire, where the note sued on was made, was six per cent. Gen. Laws of N. H. of 1878, ch. 232, §§ 2, 3. Interest at a higher rate has been received by the plaintiff on this note, and on notes in renewal of which it was given.

The question before us is whether any deduction should be made from the amount apparently due on the note, according to its terms, on account of this receipt of interest in excess of six per cent. It was held in the Superior Court that no such deduction should be made, and that the plaintiff was entitled to judgment for the amount of the principal of the note and interest. This was error.

The taking of interest at a rate in excess of six per cent was in violation of a law of the United States which is in force in this Commonwealth as well as in New Hampshire, so far as relates to contracts made by National banks existing in New Hampshire. The rate of interest which a National bank in any State may take is determined and fixed by the statute of the United States, although it is measured in such State by reference to the local law concerning interest, if there be one. And when a bank takes interest in excess of the legal rate, it violates the law of the United States, and not the law of the State; and the consequences are those provided by the law of the United States, and not those provided by the State law. *Davis v. Randall*, 115 Mass. 547; s. c., 15 Am. Rep. 146; *Central National Bank v. Pratt*, 115 Mass. 539; s. c., 15 Am. Rep. 138; *Farmers & Mechanics' National Bank v. Dearing*, 91 U. S. 29.

As the law regulating the rate of interest which the plaintiff might lawfully take is a National law, as binding in this Commonwealth as to all matters affected by it as our own laws are, the case differs from those in which it has been held that a penalty, as a partial defense, authorized by the laws of another State, cannot be applied or made effective in this State. See *Akers v. Demond*, 103 Mass. 318; *Gale v. Eastman*, 7 Metc. 14.

The taking of excessive or usurious interest made the note inoperative as to all the interest which it carries by its terms, by virtue of a law in force throughout the United States. The forfeiture of interest may be availed of in an action on the note, by way of defense. *Farmers & Mechanics' National Bank v. Dearing*, 91 U.

S. 29. In the case cited, the suit was in the State where the usurious interest was taken. But there is no reason for holding, that when the suit is in another State, the same defense is not open. That would be saying that the National law shall be inoperative in defense of an action brought outside the State where it was violated by the plaintiff. It would be saying that the National law against usury shall be operative in defense within the State where it was exacted, and inoperative in the rest of the Union; that a usurious contract by a National bank is void *pro tanto* in the State where it was made, and good without abatement elsewhere. This cannot be.

There is nothing in *Barnet v. National Bank*, 98 U. S. 555, which is inconsistent with the doctrine in *Farmers & Mechanics' Bank v. Dearing*, *ubi supra*. In the earlier of the two cases, it was decided, that where a National bank in the State of New York had taken usurious interest on a note, it was entitled to recover in a suit on the note the amount of the principal of the note less the amount of the interest unlawfully reserved. In the latter case, it was decided, that in an action on a bill of exchange, the assignees in bankruptcy of the acceptor, who became defendants, could not set off, as a counter-claim, twice the amount of usurious interest which had been paid by the acceptor on other bills and on notes which had been paid up by him. The statute, in section 5198, provides for the forfeiture of all the interest which the note carries with it, where the bank has taken or reserved or charged a higher rate than the law allows. The maker of the note can avail himself of this provision in defense of an action on the note, and in no other way. *Farmers & Mechanics' Bank v. Dearing*, *ubi supra*. The same section provides, further, that if the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the bank taking or receiving the same. This remedy is applicable when the note has been paid, and ordinarily at least, not till then, and can be availed of only in the form prescribed by the statute, that is to say, by action against the bank.

The forfeiture of the interest can be availed of in an action in the State court, as well as in the United States court. It would be a strange condition of the law which permitted a National bank, the creature of the National law, to avoid in a State court a defense to its action on a contract which is expressly provided for by the

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statute under which the bank exists. This point is settled in the case already cited of *Farmers & Mechanics' Bank v. Dearing*, which was a writ of error to a court of the State of New York, and in which the Supreme Court of the United State held that the bank was entitled to judgment only for the principal less the unlawful interest taken, and ordered proceedings in the State court accordingly.

We are of opinion further, that as the reserving or taking of unlawful interest avoids the note so far as interest is concerned, the defense is open to the defendant in any action brought to recover the amount of the note, though it be more than two years after the unlawful taking of interest. The statute does not fix a limit of two years within which such defense must be availed of. It limits the time within which an action may be maintained to recover twice the amount of unlawful interest paid to two years. But as we have seen, that is an entirely different matter from the defense of usury in an action on the note.

According to the terms of the case stated, the case must be sent to an assessor to determine the amount to be deducted from the note sued on, and the amount, if any thing, for which judgment shall be entered.

Judgment accordingly.

NOTE BY THE REPORTER. — It is true that in *Farmers & Mechanics' Bank v. Dearing*, 91 U. S. 29; s. c., Thomp. Nat. Bk. Cas. 117, the bank was allowed "to recover the principal of the note sued upon, less the amount of the interest unlawfully reserved." But in *Barnet v. Nat. Bank*, 98 U. S. 555; s. c., Brown's Nat. Bk. Cas. 18, without expressly overruling the former, it was distinctly held that neither the usurious interest paid could be set off, nor could twice the amount thereof be recovered by way of counter-claim. The court said: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved must resort. He can have redress in no other form or mode of procedure." The latter doctrine has been accepted on the authority of the latter case by the Pennsylvania Supreme Court in *First Nat. Bk. of Clarion v. Gruber*, 87 Penn. St. 465 s. c., Browne's Nat. Bk. Cas. 395; and by the New York Court of Appeals, upon reargument in *Nat. Bk. of Auburn v. Lewis*, 81 N. Y. 15, modifying the rule as laid down by that court in the same case, 75 id. 516; s. c., 31 Am. Rep. 484; Browne's Nat. Bk. Cas. 305, in accordance with the decision in the *Barnet* case. In the *Lewis* case the court said: "In accordance with a well-settled principle we must follow and stand by its decision upon the main question determined, that in an action brought to recover the amount of a promissory note discounted by a National bank, it cannot be set up by way of counter-claim or set-off that the bank in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took and was paid a greater rate of interest than that allowed by law, and that the remedy in such a case is an action of debt to recover back twice the amount paid." To the same effect, *Oldham v. First Nat. Bk.*, 85 N. C. 240. In *Monteau Nat. Bk. v. Miller*, 73 Mo. 187, it was held, in conformity also to the *Barnet* case, that where the usurious interest has been stipulated for but not paid, the bank can recover only the sum lent.

ROGERS V. UNION STONE COMPANY.

(180 Mass. 581.)

Contract — substitution.

A being indebted to C., gave him a written order on B., for goods which B. had contracted to deliver to A. B. accepted the order. *Held*, that C. could not maintain an action on the contract against B.

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

F. T. Blackmer & F. W. Griffin, for defendant.

F. P. Goulding, for plaintiffs.

ENDICOTT, J. It appears that Buchanan, Ware & Co. had a contract with the defendant for the delivery of certain goods, and on January 8, 1876, they signed an order directed to the defendant to deliver to the Wood & Light Machine Co. two thousand dollars in the said goods. The order was accepted by the defendant's treasurer on the same day, and on January 10 following, was given to the company to hold as collateral security for the payment of five promissory notes of that date, signed by Buchanan, Ware & Co.

This order was for the delivery of two thousand dollars, to be paid in merchandise, and is not negotiable. *Gushee v. Eddy*, 11 Gray, 502. It was said by Mr. Justice METCALF in *Sears v. Lawrence*, 15 Gray, 267, "The law and incidents of a bill of exchange do not attach to such an instrument."

By the acceptance merely of this order the defendant entered into no contract with the Wood & Light Machine Co. The company was no party to the contract, and if the defendant made any binding contract by accepting the order, it was with Buchanan, Ware & Co.

This case falls within the rule laid down in numerous decisions in our reports, and which is well stated in *Exchange Bank v. Rice*, 107 Mass. 37; s. c., 9 Am. Rep. 1, "that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made

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by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter." See also *Millard v. Baldwin*, 3 Gray, 484; *Field v. Crawford*, 6 id. 116; *Dow v. Clark*, 7 id. 198; *Pettee v. Peppard*, 120 Mass. 522; *Gamwell v. Pomeroy*, 121 id. 207; *Cottage Street Church v. Kendall*, 121 id. 528; s. c., 23 Am. Rep. 286; *Prentice v. Brimhall*, 123 Mass. 291.

The exceptions to this rule, so far as they have been at any time recognized in this Commonwealth, are stated and discussed in *Mellen v. Whipple*, 1 Gray, 317, as well as in *Exchange Bank v. Rice*, and need not be further considered, inasmuch as the case at bar does not fall within them.

Nor do the cases of *Walker v. Sherman*, 11 Metc. 170; *Sears v. Lawrence*, 15 Gray, 267, and *Eastern Railroad v. Benedict*, 15 id. 289, furnish any support to the plaintiffs. The facts in those cases distinguish them from this case.

In *Walker v. Sherman*, it was held that a suit could be maintained by the payee against the acceptor of an order for merchandise, upon proof that the drawer was in debt to the payee when the order was drawn, that it was given in payment of the debt, and was accepted at the request of the drawee when it was drawn; all the parties being present at the acceptance. The fact that the order was given in payment is relied on in the opinion by Mr. Justice WILDE, as showing that the plaintiff could maintain no action except on the order; and as loss to the plaintiff, as well as benefit to the defendant, would be a good consideration, there was a sufficient consideration to support the promise. And even if it was not given in payment of the debt, yet the other facts would authorize the inference that the plaintiff agreed to forbear suing the drawer on receiving the order. It is upon this last ground that the case is cited as authority by Mr. Justice WILDE in *Johnson v. Wilmarth*, 13 Metc. 416, 421; by Chief Justice SHAW in *Boyd v. Freize*, 5 Gray, 553, 555; and by Mr. Justice BIGELOW in *Mecorney v. Stanley*, 8 Cush. 85, 88. As the payee was present when the order was accepted, the facts would have also warranted the inference of a direct promise to the plaintiff by the acceptor. There is no evidence in the case before us, that there was any agreement to forbear to sue the drawer by the payee, as the debt for which he finally took the order, as collateral security, apparently was not contracted until after the order was drawn and accepted; and if it

were, the defendant had no knowledge of the transaction. *Ellis v. Clark*, 110 Mass. 389.

In *Sears v. Lawrence*, it was held that an oral promise by the drawer of an order payable in merchandise, after he knew it had not been fulfilled, to deliver the merchandise, would not support an action. The remark of Mr. Justice METCALF in delivering the judgment, that the plaintiff could maintain an action against the acceptor if there was a legal consideration for the acceptance, must be understood to mean, if the acceptance was made after the order passed into the hands of the plaintiff, by a promise to him. The remark, not being necessary to the decision of the case, is not so carefully limited and qualified as it would otherwise have been.

In *Eastern Railroad v. Benedict*, one Fuller agreed with the defendant to deliver him a quantity of goods to be paid for in the stock of a corporation, and afterward drew his order on the defendant to give a certain number of shares to the plaintiff, and the defendant promised the plaintiff to deliver the stock accordingly, and the action was maintained. In the case at bar there was no promise to the plaintiffs by the defendant, at the time the order was drawn or afterward, to pay the order or deliver the merchandise. And in the opinion of a majority of the court, the case as presented to us falls within the general rule stated in *Exchange Bank v. Rice*.

Exceptions sustained

CASES
IN THE
SUPREME COURT
OF
MISSOURI

SHELLEY V. BOOTHE.

(73 Mo. 74.)

Fraud—conveyance—preference of creditor.

A creditor may lawfully take from his debtor a conveyance with the honest purpose of securing his own debt, although he knows that it is intended to hinder and delay other creditors.

ACTION for recovery of personal property. The opinion states the case. The defendant had judgment below.

T. A. Gill, for appellants.

Karnes & Ess, for respondent.

NORTON, J. This is an action for the recovery of the possession of a stock of goods, on the trial of which defendant obtained judgment from which the plaintiffs have appealed. The stock of goods in question had been seized by defendant, Boothe, as sheriff of Jackson county, by the levy of a writ of attachment sued out at the instance of J. W. Wood & Co., creditors of the firm of Woy & Smith, as the property of said Woy & Smith. Plaintiffs, after the goods were thus seized, brought this suit and replevied the goods so levied

upon. Plaintiffs base their claim to the goods on the ground that Woy & Smith, before the levy of the attachment sued out by Wood & Co., had transferred the goods in payment of the debts of certain of their creditors of whom plaintiffs were one, and that under this transfer the goods had been sold and bought by plaintiffs and the proceeds applied to the payment of the debts of Woy & Smith. The defendant on the other hand claims that said transfer was made by said Woy & Smith with the intent and for the purpose of hindering, delaying and defrauding said Wood & Co. in the collection of their debt against said Woy & Smith, for the collection of which they had a suit pending at the time of said transfer, and that plaintiff accepted the goods with knowledge of these facts. The contest is virtually between two creditors of Woy & Smith, and the evidence adduced on the trial tended to establish each one of the above theories, and the only question presented for our determination is whether the court in giving instructions properly declared the law.

The instructions given on behalf of plaintiffs recognize to the fullest extent the doctrine that the debtor has a clear and undisputed right to prefer one creditor to another and apply his property to the payment of one set of creditors to the exclusion of other creditors, and when this is done in payment of *bona fide* debts the transaction will be upheld, although in doing so the act of the debtor had the effect, and it was his intention to defer or hinder another creditor who at the time had a suit pending against him. While the instructions given on behalf of the plaintiffs covered their theory of the case, those given for defendant, especially the third, which authorized the jury to find for the defendant if they believed that at the time the goods were transferred plaintiffs were aware of the fact that it was the intention of Woy & Smith, in making it, to hinder and delay Wood & Co. in the collection of their debt, go further, we think, than the law warrants. The third instruction is as follows: "If Woy & Smith in making the conveyance of the goods in suit intended to delay J. W. Wood & Co., their creditors, and if the plaintiff either by himself or his agent present at the sale was aware of such intent, then you will find for the defendant."

There is a class of cases to which the doctrine asserted in the instruction applies; as if one knowing of judgment and execution against another goes and purchases his goods in order to defeat the

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execution, or if one knowing that a debtor is selling his property to hinder, delay or avoid the payment of his debts, buys it and pays the full value of it, thereby enabling the debtor to carry out his fraudulent design, such sales will be adjudged fraudulent because the purchaser becomes a participant in the iniquitous purpose of the debtor. But cases of this kind should not be confounded with those which only amount to giving a preference of one creditor over another. A debtor may give a preference to a particular creditor or set of creditors by a direct payment or assignment, if he does so in payment of his or their just demands and not as a mere screen to secure the property to himself. The pendency of another creditor's suit is immaterial and the transaction is valid though done to defeat that creditor's claim. *Kuykendall v. McDonald*, 15 Mo. 416; *Murray v. Cason*, id. 415; *State v. Benoist*, 37 id. 500; Bump on Fraud. Con. 350, 351; *Potter v. McDowell*, 31 Mo. 74. The right of a debtor to prefer one creditor over another necessarily implies the right of such creditor to accept such preference. While the effect of such preference must, to the extent that it is made, necessarily be to defer or to hinder or delay other creditors, the mere knowledge of the preferred creditor that such will be its effect and the debtor intended it should have that effect, will not be sufficient to avoid the transaction as to a creditor not preferred. But if in such case it further appears from the circumstances attending the transaction that the preferred creditor was not acting from an honest purpose to secure the payment of his own debt, but from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit, he will not be protected, and the sale would be fraudulent as to other creditors, because in such cases the fraud of the debtor becomes the fraud of the preferred creditor because of his participancy therein. Judgment reversed and cause remanded, in which all concur.

Judgment reversed.

MCLWRATH V. HOLLANDER.

(73 Mo. 103.)

Notice — lis pendens—conveyance pending contest of will.

A conveyance by heir or devisee, of lands devised, pending proceedings to contest the validity of the will, is subject to a subsequent judgment in such proceedings, although no notice of the pendency of such proceedings has been filed as required by the statute in actions based on an equitable right, claim or lien, designed to affect real estate. (See note, p. 487.)

EJECTMENT. The opinion states the case.

R. D. Ray and L. T. Collier, for appellants.

H. M. Pollard, for respondent.

HOUGH, J. This was an action of ejectment. Both parties claim title under John Cowgill, who on March 25, 1865, died seised of the land sued for, leaving a will by which he devised the same to Rachel and Henry Cowgill, which will was duly admitted to probate in the Probate Court of Livingston county on the 30th day of March, 1868. On the 29th day of October, 1868, Jeremiah Tingley and others instituted proceedings, under the statute, in the Livingston county Circuit Court, against Rachel Cowgill and Henry Cowgill, and others, to set aside said will, and the process issued therein against Rachel and Henry Cowgill was duly served on them on the 30th day of October, 1868. This suit was removed by change of venue to Buchanan county, in the Circuit Court of which county, on the 25th day of May, 1875, it was adjudged by agreement that the paper writing admitted to probate in Livingston county on the 30th day of March, 1868, as the last will and testament of John Cowgill, deceased, was the last will and testament of said John Cowgill; and it was further adjudged by agreement, that Henry and Rachel Cowgill should pay all costs which had been incurred by either party in the various courts in which said suit had been prosecuted, and the said judgment against them for costs should be a lien on the lands devised to them by said will, lying and being in Livingston county, which lands were described in the judgment. A copy of this judgment was filed for record with the clerk of the

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Circuit Court of Livingston county on the 26th day of May, 1875, and was duly recorded. The costs adjudged against Rachel and Henry Cowgill amounted to \$808.93, and to collect the same a special execution was issued on November 30, 1875, from the Buchanan Circuit Court to the sheriff of Livingston county, under which the lands in controversy were sold to the defendant, Hearne, who received a deed therefor from the sheriff, dated January 25, 1876, and acknowledged by him February 25, 1876. The defendant, Hollander, was the tenant in possession. On the 30th day of October, 1868, a notice of the suit of Tingley against Cowgill, stating where and when the same was brought, also the names of the parties and a description of property to be affected thereby, was filed and recorded in the office of the recorder of deeds of Livingston county. On the 11th day of September, 1874, Henry and Rachel Cowgill executed a deed of trust on the lands in controversy, to H. M. Pollard, trustee, to secure the payment of a certain promissory note therein described. Under this deed said premises were sold and conveyed to the plaintiffs on the 4th day of May, 1876, and they have instituted the present suit to recover possession of said lands from the purchaser at the sale under the execution before mentioned. It will be observed, from the foregoing statement of facts, that the rights of the parties to this suit depend upon the effect to be given to the deed of trust executed by Henry and Rachel Cowgill pending the suit contesting the validity of the will of John Cowgill. This question involves a consideration of the doctrine of *lis pendens* and an examination into the validity of the judgment of the Circuit Court of Buchanan county creating a lien for costs upon lands in Livingston county.

It is contended by the plaintiffs that the doctrine of *lis pendens* is purely a doctrine of equity, recognized and enforced in equity alone, and cannot therefore be invoked by the defendants in this case. It is true, as claimed by the plaintiffs, that a suit, under the statute, to contest the validity of a will, is to be regarded as an action at law. This has been repeatedly decided by this court. *Lyno v. Marcus*, 1 Mo. 410; *Swain v. Gilbert*, 3 id. 347; *Young v. Ridenbaugh*, 67 id. 574; R. S., § 3980. But it is an error to suppose that the doctrine of *lis pendens* is applicable alone to suits in equity. We are aware that it has been so held in the case of *King v. Bill*, 28 Conn. 593, but as was observed by this court in *O'Reilly v. Nicholson*, 45 Mo. 160, the rule is older in law than in equity, and

was adopted from the common law courts by Lord BACON as one of his ordinances "for the better and more regular administration of justice in the court of chancery." *Murray v. Ballou*, 1 Johns. Ch. 577; 1 Hilliard on Vendors, 411, § 22; *Turner v. Babb*, 60 Mo. 342; *Real Estate Savings Inst. v. Collonious*, 63 id. 290; and it has been repeatedly applied in actions of ejectment and in other suits at law. Wade on Notice, § 343; *Tilton v. Cofield*, 93 U. S. 163. Under our statute in relation to equitable liens and notice thereof, this rule as formerly enforced by courts of chancery is no longer recognized in suits in equity affecting real estate, but the plaintiff in any civil action, based on any equitable right, claim or lien, designed to affect real estate, is required to file for record with the recorder of deeds of the county in which such real estate is situated, a written notice of the pendency of the suit, giving names of parties, style of suit, term of court to which brought, and a description of the property to be affected thereby; and there is no constructive notice to purchasers or incumbrancers until such notice is filed. R. S., § 3217. There is no such requirement as to actions at law, and as to such actions the rule remains as at common law. Such being the case, the written notice filed with the recorder by the plaintiffs in the suit of Tingley against Cowgill amounted to nothing.

It is further contended that the rule of *lis pendens* is not applicable to this case for the reason that the title to the land now in controversy was not the subject-matter of the suit of Tingley against Cowgill; that the will was the *res* involved in that suit. In one sense it was, but it is quite clear that a will devising real property operates as a conveyance of such property, and it follows therefore that a suit contesting the validity of such will directly assails the validity of such conveyance, and necessarily involves the title. No one would care to contest the validity of a will, but for the fact that it is a muniment of title; and pending a contest involving the validity of a devise, the law will not permit either the heir or the devisee to alien the property devised, so as to avoid the effect of the judgment which may be rendered in such suit. "Suppose," said Lord HARDWICKE, in the case of *Garth v. Ward*, 2 Atk. 174, "an heir at law to get into possession of the ancestor's estate immediately upon his death, and that during a suit in this court for establishing the will of the ancestor in favor of the devisee, the heir conveys this estate to a stranger, and afterward the will is estab-

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lished in this court, can it be contended that the grantee of the heir is not bound, and that this suit will be looked upon as no *lis pendens* as to such grantee?" It may be remarked in this connection that Henry and Rachel Cowgill acquired no right to execute the deed in question, from the fact the will of John Cowgill had been proved in common form in the Probate Court of Livingston county; for when the suit was instituted in the Circuit Court to contest the validity of said will, the action of the Probate Court was in effect annulled, and they had no more authority to convey as devisee than if the will had been presented to the Probate Court. *Lamb v. Helm*, 56 Mo. 420; *Rogers v. Dively*, 51 id. 193.

[A minor point omitted.]

It follows from the foregoing views that the title acquired by the defendants under the execution sale is superior to that acquired by the plaintiffs under the trust deed, and the judgment must therefore be reversed and the cause remanded. The other judges concur, except RAY, J., who, having been of counsel, did not sit.

Judgment reversed.

NOTE BY THE REPORTER.—The doctrine of *lis pendens* at common law was discussed in *Dovey's Appeal*, 97 Penn. St. 153. The court said:

"The doctrine of *lis pendens* has been essentially modified by the later decisions. In the earlier cases, both in England and this country, it was held that *lis pendens* was notice to all the world, with the same effect as the registration of a deed under the recording acts as to constructive notice of the conveyance. More recent cases, however, place the doctrine upon another, and we think, a sounder basis. In the leading case of *Bellamy v. Sabine*, 1 DeG. & J. 580, it was said by Lord Chancellor CRANWORTH: 'It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.'

"The doctrine of *lis pendens*, says Mr. Adams, in his work on Equity, has been recently considered and decided not to stand on the ground of notice, express or implied, but to follow from the general rule, that pending litigation, neither party can be permitted to alienate the contested property, so as to affect the rights of the other.' This is a rule of public policy, and the object of it is to prevent the parties from making a conveyance *pendente lite* of the property or thing which is the subject-matter of the controversy, and and thus to defeat the execution of the decree of the court. The effect of it is to impose a disability to convey from the time of the service of the subpoena upon the defendant. The court, in the execution of its decree, pays no regard even to a bona fide purchaser. In other words, no change of ownership during a suit will prevent the execution of a decree, as it could and would have been executed had there been no change.

"It was urged, however, and the court below adopted this view, that as the bill filed by Moody on October 14, 1875, to compel a transfer by the bank, was pending and undetermined when he pledged the stock to Dovey, the said bill was a *lis pendens*, and avoided the pledge. But that bill came to nothing; it was dismissed, and that is the only decree in the cause. It could not affect this case unless we hold the dangerous, if not absurd, doctrine that *lis pendens* is to apply to every suit, even where the cause of action is purely imaginary. The consequence of such a rule would be that any man's property could be

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ties up, and alienation prevented by the filing of a bill setting forth a claim which had no foundation whatever.

"As the record stands, the most that can be urged for Moodie's bill is that it was constructive notice to Dovey. But under the modern doctrine of *lis pendens*, constructive notice amounts to nothing, and we are of opinion that a *lis* to affect the party and destroy his power of alienation must be a *lis* in which a decree could be entered against him as to the property which is the subject-matter of the contention. He may not convey *pendente lite*, for the reason that such transfer would defeat the execution of the decree. But if the proceeding is such that no decree can be entered, why may he not convey? The true rule would seem to be that a purchaser is affected by the decision upon any claim to the property purchased, if there be a litigation pending in which that question is decided. *Newman v. Chapman*, 2 Rand. 92.

"It was said in *Murray v. Lybburn*, 2 Johns. Ch. 411, that the doctrine of *lis pendens* may not apply to movable personal property, on the ground of the necessities of commerce; in the county of Warren *v. Marcy*, 7 Otto 96, that it does not apply to negotiable securities; and in *Leitch v. Wells*, 48 N. Y. 586, that it does not apply to stocks. We neither affirm nor deny the latter proposition, but decide this case upon other grounds."

In *Gardner v. Peckham*, Rhode Island Supreme Court, 1882, pending a bill in equity affecting the title of realty, third persons, with the consent of the respondents, cut, carried off and appropriated quantities of wood and brush from the realty in question. After a decree in his favor the complainant filed another bill in equity to ascertain the amount of stuff so cut and carried off; and to enforce payment from such third persons. This bill charged no conspiracy with the former respondents, nor any attempt to commit actual fraud. Held, that the bill could not be maintained. The court said: "The ground of relief is simply that the defendants cut and carried away the wood and brush during the pendency of her former suit, and that the wood and brush having been involved in that suit as a part of her farm, she is entitled to recover its value of the defendants by force of the doctrine of *lis pendens*. The doctrine of *lis pendens* is this, that real property, or to some extent, personal property, when it has been put in litigation by a suit in equity, in which it is specifically described, will, if the suit is prosecuted with diligence, be bound by the final decree, notwithstanding any intermediate alienation. It will be seen that the doctrine as stated does not reach the case at bar, for in the case at bar, the complainant is seeking to recover, not any property which is bound by the decree, but the value simply of certain property which was not bound by the decree, but which, in all probability, had been burned up before the decree was entered. She cites no satisfactory precedent for such an extension of the doctrine. The question is, can it be so extended? We think not. The doctrine is founded on the policy that property which is specifically sued for shall abide the result of the suit, for otherwise, by successive alienations, the litigation might be indefinitely prolonged: *Bellamy v. Sabine*, 1 De G. & J. 586. The doctrine relates only to changes of ownership, but assumes that the property itself will remain either identically the same or be at least specifically traceable into some new form in which it can be reached. That is not the case here. The suit here is in the nature of an action of trover and conversion. It seeks not the thing, but the value of the thing, or damages for its conversion. It is a mere personal claim. If the suit can be maintained, we do not see why, on the same principle, similar suits cannot be maintained against purchasers for the value of hay, corn, potatoes, or fruits raised on the farm and sold. Certainly it never has been supposed that a suit to annul the conveyance of a farm could entail such results. We do not think public policy, which is the source of the doctrine of *lis pendens*, requires that it should entail them. The doctrine is not a favorite of the courts, and will not be extended without strict necessity. *Leitch v. Wells*, 48 N. Y. 585. It is only because wood is a more permanent part of a farm than its other products that we feel any inclination to entertain the suit. But we are not prepared to entertain it on that account, in the absence of any charge of actual fraud. We think the complainant, if not satisfied with the personal responsibility of Peter Kiernan and his children, should have applied for an injunction, or some other preventive order, to protect her interests."

McMahan v. Geiger.

MCMAHAN V. GEIGER.

(73 Mo. 145.)

Negotiable instrument — signing note after delivery — judgment — estoppel.

A note signed by a principal and a surety, both apparently principals, was signed by the defendant, two months after its execution and delivery for value, at the request of the payee, for his accommodation. The payee afterward recovered against the three by default and consent. One of the original makers having paid the judgment sued the defendant for contribution. *Held*, (1) that the defendant's signing imposed no liability; (2) that he was not precluded from setting up that defense by the judgment.*

ACTION for contribution on a promissory note. The opinion states the facts. The plaintiff had judgment below,

C. W. Thrasher, for appellant.

J. C. Cravens, for respondent.

NORTON, J. The facts in this case are as follows : That on the 23d day of March, 1873, one Jno. O'Day loaned to one Creighton the sum of \$500, for which Creighton at the time executed his note, together with the plaintiff, John T. McMahan; that the money for which the note was executed was given by O'Day to said Creighton on the delivery to him of the note executed as above; that none of the money was received by said McMahan, and that the loan was made on the strength of McMahan's name; that some two or more months after the execution and delivery of the note and after consideration for it had passed, said O'Day, the payee therein, requested defendant, Geiger, to sign the note, with which request he complied; that after default in the payment of said note, O'Day brought suit thereon in the Probate and Common Pleas Court of Greene county against said Creighton, McMahan, and Geiger, and that service of the writ and petition was duly had upon Creighton and McMahan, and that Geiger made the following indorsement on the back of the writ intended for him, viz.: "I hereby acknowledge service of the within writ, and waive the necessity of service by an officer, and consent that judgment be

*Compare *McNaught v. McClaghry*, (42 N. Y. 22), 1 Am. Rep. 487; *Monson v. Drakeley* (40 Conn. 552), 16 Am. Rep. 74.

rendered against me and co-defendants on the same ;” that judgment by default was rendered in said suit against all three of said defendants, for the sum of \$540 ; that McMahan paid in 1876, in full satisfaction of said judgment, the sum of \$678.60 ; that the note on which said judgment was rendered, is as follows :

MARCH 20, 1873.

Six months after date, for value received, we, or either of us, promise to pay John O’Day, or order, \$500, with ten per cent, interest per annum, from date.

(Signed)

J. H. CREIGHTON.

JOHN F. McMAHAN.

W. F. GEIGER.

McMahan brings this suit against Geiger for contribution, in which he asks judgment against him for one half the amount paid by him in satisfaction of said judgment. The trial court rendered judgment according to the prayer of the petition, from which defendant has appealed ; and the sole question presented is, whether on the above facts defendant can be made liable as the co-surety of plaintiff on said note.

We think it clear, from all the authorities, that the act of Geiger in signing the note two months after its execution and delivery, and two months after the consideration had passed between the original parties thereto, did not impose upon him or create any legal obligation either to O’Day, Creighton or McMahan.

Had these facts been set up in defense by Geiger in the suit brought by O’Day on the note, no judgment could have been rendered against him. He however did not avail himself of this defense, but waived it, and consented to the rendition of judgment against him, and it is insisted that because of this action on his part he is precluded by the judgment from showing the actual relation he sustained to defendant. This position, we think, is not well taken. Mr. Freeman, in his work on Judgments, § 23, lays down the following rule, in speaking of the effect of a judgment, viz.: “ Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action. If A. recovers judgment against B. and C., upon a contract, which judgment is paid by B., the liability of C. to B. in a subsequent action for contribution is still an open ques-

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tion, because as to it no issue was made or tried in the former suit. As between the several defendants therein a joint judgment establishes nothing but their joint liability to the plaintiff. Which of the defendants should pay the entire debt, or what proportion each should pay in case each is partly liable, is still unadjudicated ; but a judgment against two joint debtors prevents either from denying the existence and obligation of the debt, though he may still prove by any competent evidence in his power that the whole burden of the obligation should be borne by the other."

Guided by this rule, we are at liberty to consider the facts attending the transaction, in order to ascertain the true relation that defendant sustained to plaintiff, as an obligor on said note. That such relation is not that of co-surety, we think, is clear, inasmuch as Geiger's signature was not procured by the request of either Creighton or McMahan. When the note, two months after the consideration had passed, and after its execution and delivery by Creighton and McMahan, was presented by O'Day, the payee, to Geiger for his signature, without any explanation having been made to him that Creighton was the principal and McMahan simply a security, Geiger had a right to rely on the legal principle that Creighton and McMahan were *prima facie* principals, and his signature thereto, under the circumstances, did not attach to him the liability of a co-surety to McMahan, but the liability either of a guarantor or of a surety to Creighton and McMahan as principals, and which of these relations it established, if either, it is not necessary for the purposes of this case to determine. Had the facts been explained to Geiger when the note was presented to him for his signature—that Creighton was principal and McMahan his surety, he might have declined to sign the note as security for Creighton, when in the absence of such explanation, and relying upon the legal principle that both were *prima facie* principals, he was willing to become bound as the security for both. McMahan's liability for the payment of the whole debt, with the right to look only to Creighton for reimbursement, had fully attached and became complete two months before Geiger signed the note, and without any reference thereto, and in paying off the judgment, McMahan did nothing more than he originally contracted to do. To allow him (as the judgment in this case does), to cast off half the burden thus assumed on to Geiger, would be to grant him a right which did not exist at the time he incurred the obligation, and to impose on

Geiger an obligation to McMahan which he never assumed. For the reason herein given, the judgment will be reversed, in which all concur.

Judgment reversed.

BRINKMAN V. HUNTER.

(73 Mo. 172.)

Negotiable instrument—promise to accept for given sum—overdraft

If one promises by telegraph to accept a draft for a specified sum, and the draft being afterward drawn for a larger sum, he refuses to accept, he is not liable on the draft to any extent, nor for breach of agreement to accept.

ACTION on a draft. The opinion states the facts. The plaintiffs had judgment below.

F. M. Black, for appellants.

Lathrop & Smith, for respondents.

HUGH, J. The amended petition upon which the case was tried contains two counts. The first count states in substance that on the 23rd day of September, 1875, Clark & Goldsby drew their draft on defendants for \$680.92 in favor of plaintiff by the name of Samuel Maher, cashier; that before that time, on the 20th day of September, defendants, by their unconditional promise in writing, had agreed with plaintiffs to accept and pay the same to the extent and amount of \$608.92; that said promises were made by telegraph; that on the faith of said promises, plaintiffs received said draft for a valuable consideration, and are the owners thereof, and that said draft was presented for payment and payment refused, and plaintiffs ask judgment for \$608.92 and interest. The second count states that on the 20th day of September, 1875, defendants sent to plaintiffs a telegram, as follows: "Kansas City, Missouri, September 20, 1875. We will pay Clark & Goldsby's draft for \$608.92. Hunter, Evans & Co.;" that plaintiff received the same on that day; that on the 23rd day of September Clark & Goldsby drew their draft for \$680.92 in favor of said cashier, describing it as aforesaid; that plaintiffs, on the faith of said telegram, advanced more than \$608.92, and became the owners and holders thereof in good faith; that de-

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defendants refused to accept or pay said draft; that by the breach of defendants' said promise they have been damaged in the sum of \$608.92, and for which, with interest, they ask judgment. The answer of defendants is a general denial. Defendants, at time of trial, filed their motion to require the plaintiffs to elect upon which count they would proceed, for the reason that there was but one cause of action stated in two counts. This motion the court overruled and defendants excepted.

The cause was submitted on an agreed state of facts and the deposition of plaintiff Maher. The facts as agreed upon are as follows: The plaintiffs were and still are partners, doing a banking business at Great Bend, in the State of Kansas, and Samuel Maher is the cashier of their banking firm. The defendants were live stock commission merchants, doing business at Kansas city, Missouri. Clark & Goldsby were, at the time of the transaction in controversy, buying and selling cattle, and were also known by the firm of Clark, Goldsby & Co. Clark & Goldsby, on the 20th day of September, 1875, applied to plaintiffs, at Great Bend, to have their draft on defendants cashed. Plaintiffs said they would cash a draft on a telegram from the defendants. Thereupon and on that day Clark & Goldsby sent to defendants a telegram, which is as follows:

TO HUNTER, E. & Co.:

Telegraph to J. V. Brinkman & Co. to advance us proceeds of last shipment. We need it. Give market. Will ship if possible.

CLARK, GOLDSBY & Co.

On the same day and in reply thereto defendants sent from Kansas City to plaintiffs, at Great Bend, a telegram, as follows:

TO J. V. BRINKMAN & Co., Great Bend, Kansas:

We will pay Clark & Goldsby's draft, \$608.92.

HUNTER, EVANS & Co.

Plaintiffs did not see Clark & Goldsby again until the 23rd day of said month, when they informed them of the receipt of said last mentioned telegram, and thereupon Clark, Goldsby & Co. drew the

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draft sued upon and attached to the petition in this cause on the defendants for \$680.92, and which plaintiffs discounted and payed Clark, Goldsby & Co. a valuable consideration therefor, and more than \$608.92.

On the 23rd day of September, 1875, Clark & Goldsby sent to defendants a telegram from Great Bend, as follows:

TO HUNTER, E & Co.:

Turn over to Powers, Rial & Co. the amount which you have to our credit.

CLARK & GOLDSBY.

Which telegram was received by the defendants on that day. Indorsed on the same is "complied with." Plaintiffs forwarded said draft to the Mastin Bank of Kansas City, Missouri, for collection, and the same was, on the 25th day of September, 1875, presented to defendants for payment, and payment of the amount of the draft was demanded of them, which they refused to pay, and never have paid the same. Before the presentation of the draft to the defendants, to wit: on September 24th, 1875, they had paid over the amount to the credit of Clark & Goldsby, to wit: \$608.92, to Powers, Rial & Co. On the 29th day of September, 1875, plaintiffs wrote to defendants a letter as follows:

GREAT BEND, KANSAS, *September 29th, 1875.*

HUNTER, EVANS & Co., Kansas City, Missouri:

Dear Sir—Mastin Bank, of your city, returned to us unpaid a draft drawn by Clark, Goldsby & Co. on you for \$680.92. This money was paid to C., G. & Co. by us upon receipt of a telegram from you that their draft upon you was good for that amount. We therefore consider you liable to us for that amount, and in case we meet with a loss will endeavor to recover from you. It is sometimes convenient for shippers to get money here on such terms as did C., G. & Co. But if the commission men, after telegraphing that they will pay a fixed amount upon a draft, pay the money out on other accounts, we cannot make such advances.

Very respectfully.

SAMUEL MAHER, Cashier.

Defendants again declined payment of the draft. No draft for

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\$608.92 has been drawn on defendants by said Clark, Goldsby & Co., nor any other draft for any amount, except the one sued upon.

The deposition of Maher, plaintiff, shows: that Clark & Goldsby were operating in cattle in the vicinity of plaintiff's place of business; they were known by the plaintiff and sometimes signed their firm name "Clark & Goldsby," at other times "Clark, Goldsby & Co.;" that plaintiff received telegram from Hunter, Evans & Co. on the 20th day of September; that the draft was not made until the 23rd day of September; that plaintiff had not seen Clark & Goldsby from the 20th to the 23rd day of September; that Clark & Goldsby still wanted the money, and thereupon the witness drew the draft for \$ 80.92 instead of \$608.92; that he made a mistake as to amount specified in the telegram, and that the draft was sent to a bank in Kansas City for collection.

The defendant asked the court to declare the law as follows: Upon the facts agreed upon in this cause, the finding of the court should be for the defendants on both alleged causes of action. This instruction the court refused to give, and the defendants excepted.

The court gave the following instruction at the request of the plaintiffs: If the court, sitting as a jury, believe from the evidence that defendants sent the plaintiffs a telegram promising to pay Clark & Goldsby's draft for \$608.92; that said telegram was received by plaintiffs; that upon the faith thereof the plaintiffs negotiated the bill of exchange filed with the petition in this cause, and that the defendants refused to accept said bill, the finding will be for the plaintiffs in such sum as the evidence shows them to have been damaged, not to exceed \$608.92—to the giving of which the defendants excepted. The court found for the defendants on the first count, and gave judgment against them for \$673.59 on the second count, and they have appealed to this court.

[Omitting question of election.]

We will consider the counts in the order presented. In the first count the telegram of the defendants is declared upon as an acceptance by them for the sum of \$608.92. In the second count the plaintiffs sue for a breach of the promise to accept contained in a telegram. The telegram of the defendants is a promise in writing within the meaning of our statute relating to the acceptance of bills of exchange. *Molson's Bank v. Howard*, 40 N. Y. Sup Ct. 15; *Central Savings Bank v. Richards*, 109 Mass. 414; 14 Am. Law Reg. (N. S.) 401. The plaintiffs having received the bill in ques-

tion for a valuable consideration on the faith of the defendants' promise, the question is, can the promise be construed to be an acceptance of the bill sued on? There is no doubt that partial, or qualified acceptances are good, and will bind the acceptor. This was decided as long ago as the year 1720 in *Wegerstoffe v. Keene*, 1 Str. 214; *vide* Edwards on Bills 419; Byles on Bills 194; and if the draft for \$680.92 had already been drawn and the defendants been notified of that fact, and that it had been offered to the plaintiffs, we think their telegram could very properly be held to refer to the draft drawn, and be construed to be a partial acceptance thereof; that is, an acceptance thereof for the sum of \$608.92. But inasmuch as no draft had then been drawn, we do not see how a promise to accept, or what is the same thing, to pay at maturity, a draft to be drawn for \$608.92, can be held to be a promise to pay a draft for \$680.92, or to pay \$608.92 on a draft for \$680.92, any more than it could be construed to be a promise to pay such sum on a draft for \$1,000 or for \$5,000. It seems to us that if the promise would be binding in one case, it would be in the other. If it be permissible to make any departure from the amount named in the promise, we do not see on what principle a limit is to be fixed which cannot be transcended. The equitable appropriation, so to speak, to the use of the drawer of the sum named in the promise, would appeal to us as strongly if the draft were for \$5,000 as it does now. And it could be said with as much force in the one case as in the other, that the payee expected and intended to look to the drawer for the excess.

If then the telegram of the defendants to the plaintiffs and on the faith of which they took the draft sued on, cannot be construed to be a partial acceptance of such draft, can the plaintiffs maintain an action for a failure to accept such draft for the sum named in the telegram? When a bill is received on the faith of a promise in writing to accept the same, before it is drawn, the promise at once takes effect, under the statutes, as an acceptance, and if the party promising refuses to pay at maturity, it is quite plain that no action can be maintained for a refusal to accept, but the action must be brought for a refusal to pay according to the terms of the acceptance. Now if the promise to accept cannot take effect as an acceptance under the statute, for the reason that it cannot be held to refer, or be applicable, to the bill in question, then we are wholly at a loss to perceive how the defendants can be held liable for a refusal to

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accept such bill; for if it were the bill they promised to accept, the promise itself would constitute an acceptance. We are aware that there are cases holding that when the bill to be drawn is so indefinitely described that the promise will not amount to an acceptance, still an action may be maintained for a breach of promise to accept. But these cases are said by high authority to rest on a distinction without a difference. Daniel on Neg. Inst., § 561; *Bissell v. Lewis*, 4 Mich. 450; *Nelson v. First National Bank*, 48 Ill. 39.

[Omitting a statutory consideration.]

The peculiar circumstances of this case make it one of great hardship upon the plaintiffs, but we do not see that we can grant them any relief without unsettling the well-established principles of commercial law. The court erred in giving the instruction asked by the plaintiffs and in refusing that asked by the defendants. The judgment must be reversed. The other judges concur.

Judgment reversed.

PULLIS V. ROBISON.

(73 Mo. 201.)

Insurance — life — of husband for wife — statutory constructions.

A statute authorizing any married woman to insure her husband's life for her sole use, free from claims of his creditors, to an amount purchasable by annual premiums not exceeding \$300 paid by him, does not prohibit such insurance of a solvent husband's life to any amount; and if part of the premiums exceeding that sum are paid by him when solvent, and part when insolvent, the proceeds will be apportioned accordingly between the widow and the creditors.

CREDITORS' bill. The opinion states the facts.

Chris. Jamison & Day, and Rudolph Schulenburg, for appellants.

A. W. Slayback, for respondent.

NORTON, J. This is a proceeding in the nature of a creditor's bill, instituted by certain creditors of James P. Robison, deceased, whose claims had been allowed by the Probate Court against his estate, to subject to the payment of said debts the proceeds of cer-

tain policies of insurance taken out on the life of said Robison, and made payable to his wife. The creditors suing are three in number, and each having brought a separate action, the three suits were consolidated and tried together. Three of the policies, the proceeds of which constitute the subject matter of controversy, were issued by the Mutual Benefit Life Insurance Company, each of them being for \$5,000, and dated respectively February 26, 1867, February 21, 1868, and May 12, 1870. The amount of annual premiums was as follows: \$283 on the one dated in 1867, \$263 on the one dated in 1868, and \$289 on the one issued in 1870. The plaintiffs claim and allege in their bill that Robison was in embarrassed circumstances, and at the time the premiums were paid he was insolvent, and that said policies were donated to his wife, and were procured for the purpose of hindering, delaying and defrauding creditors. Defendant, Mrs. Henrietta Robison, to whom said policies were made payable, denies all the allegations of the bill, and asserts her right to the proceeds of the same.

Upon the trial of the issues thus tendered, the court found that said Robison was solvent at the time said policies were taken out, and remained solvent till about the year 1876; that the payment of the two last premiums on two of said policies amounting to \$342.05, dated respectively in 1867 and 1868, which payment occurred in 1876, was made by Robison while he was insolvent, and that all payments of premiums anterior to 1876 were made by him when he was solvent. Upon this finding the court decreed that Mrs. Robison was entitled to the proceeds of the policies, less the amount of premiums paid by Robinson when insolvent, with the interest thereon, and also decreed that Mr. Pullis, the plaintiff who first brought suit, was entitled to the whole amount of the premium paid in 1876 with its interest. From this judgment plaintiffs appealed to the St. Louis Court of Appeals, where the judgment was affirmed, and from this judgment they appealed to this court.

The evidence adduced on the trial, we think, was sufficient to justify the trial court in finding the facts above set forth, and we will therefore accept its finding as correct, and thus accepting it, the question presented for our determination is whether, on the facts, the court in its decree properly disposed of the funds in dispute. Plaintiffs insist that error was committed in this respect, and contend that the premiums paid by Robison in 1876, being in excess of the sum of \$342, and having been paid while he was in-

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solvent, out of funds which ought to have been appropriated to the payment of his debts, entitles them to so much of the proceeds of the policies as may be necessary to satisfy in full their claims as creditors, even though it should consume it all.

We think it settled that the wife has such an interest in the life of her husband as to make valid an insurance effected on his life for her benefit. This has been so held in the case of *Gamb's v. Covenant Mutual Life Ins. Co.*, 50 Mo. 44. We think it also settled that when such a policy issues and expressly designates a person who is to receive the insurance money, such designation is conclusive unless some question arises as to the right of creditors of the person who paid the premiums. "The receipt of the designated person will discharge the company, and such person will be entitled to maintain an action against the company." *Bliss Life Ins.*, § 317. We think it also settled that a husband who is solvent has the right to effect an insurance on his life for the benefit of his wife, and to pay the annual premiums thereon so long as he remains solvent and can do so without prejudice to, or in fraud of, the rights of creditors. *Larkin v. McMullin*, 49 Penn. St. 29. To what extent, if to any extent, the husband can affect the rights of the wife in such a policy, by an assignment or other disposition of it, is a question which does not arise in this case, and we have therefore deemed it unnecessary to notice the numerous authorities cited by counsel bearing on that point.

The interest of the wife in a policy of insurance on the life of her husband, effected for her benefit by the husband while in unembarrassed circumstances, and fully able to discharge all his indebtedness, is not affected, as plaintiffs contend it is, by section 15, Wagner's Statutes, 936, if the husband remain solvent during the time the policy is kept alive by his paying the annual premiums. That section provides that a married woman may cause to be issued for her sole use a policy of insurance on the life of her husband, and in case she survives him, that the insurance money shall be payable to her, free from the claims of the representatives of her husband, or of any of his creditors, but such exemption shall not apply when the amount of premiums annually paid shall exceed \$300. We do not think this statute can be so interpreted as to curtail or restrict the right of a solvent husband to apply only \$300 of his means annually to the payment of premiums on his life policy procured for the benefit of his wife.

It is insisted that this interpretation has been put upon it in the case of *Charter Oak Ins. Co. v. Brant*, 47 Mo. 425; s. c., 4 Am. Rep. 328. We do not think the opinion goes to that extent, and if it did we would be unwilling to follow it; and thus give it our sanction. In that case the point in judgment was as to the validity of an assignment of a policy on which the annual premium was \$343 and which had been taken out on the life of Mrs. Brant's husband payable to her sole and separate use after her husband's death. This policy was assigned by Brant and his wife to secure the payment of a debt which Brant owed one Stagg for borrowed money. The court held the assignment to be valid, because the annual premium being in excess of \$300 prescribed by the statute took it from under the operation of the statute. The remark made in the opinion, "that the law did not intend that the husband should withdraw any greater amount from his means to be expended for such a purpose;" if it is understood as referring to a withdrawal of the means of an insolvent husband and the expenditure made thereof by him for such a purpose (and such we take to be its meaning), is entirely correct. It was certainly not intended, as counsel insist, to assert that if a husband who is perfectly solvent, with no intent to defraud creditors either prior or subsequent, applies more than \$300 annually of his means in the payment of premiums on an insurance of his life to be paid to and for the benefit of the wife, although after such payments are made sufficient of his property is left to answer the demands of his creditors, such creditors can subject the insurance money to the payment of their debt and thus deprive the wife of the benefit intended to be secured to her.

We think it was the purpose of the statute to allow a husband who might be in an embarrassed and even in an insolvent condition to secure to the wife the benefit of an insurance on his life free from the claims of creditors when the annual premium on such policy does not exceed the sum of \$300; or in other words, that he might annually withdraw for such a purpose that sum without subjecting the amount insured to the payment of creditors. Previous to the enactment of the statute an insolvent husband could not apply any portion of his means to such a purpose and deprive creditors of the right of asserting their claims to all the benefits resulting from such application. The object of the statute, in our opinion, was to change this rule to the extent indicated in the act. It follows from the view we have taken that inasmuch as all the premiums

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paid by Robison, except the sum of \$343 paid in February, 1876, were paid while he was solvent, Mrs. Robison is entitled to the benefits resulting therefrom, and that the last payment being in excess of \$300 and made while Robison was insolvent, should go to the benefit of plaintiffs.

It is insisted by counsel, that inasmuch as the payment made in 1876 kept the policies on foot and gave them vitality, the whole amount of the insurance money, or so much thereof as will be sufficient to satisfy their debts, should be so applied. We have not been cited to nor have we been able to find any authority that goes to that extent, nor are we acquainted with any equitable principle on which the claim can be founded. How the insurance money, under the facts and circumstances of this case, should be apportioned, presents a question of some difficulty, especially so as the authorities we have been able to examine are conflicting in the rules laid down. The case of *Landrum v. Knowles*, 22 N. J. Eq. 594, goes further in support of plaintiffs' position than any which has fallen under our observation, and it falls far short of what is contended for by them. In that case the wife insured the life of her husband for the benefit of her children, and after paying the annual premiums for about ten years, assigned the policy, in conjunction with her husband, to one of the husband's creditors in payment of the debt. After said assignment the wife ceased to pay the premiums, but they were paid for about nine years by the creditors. Upon the death of the husband the insurance money was claimed by the children on the one hand, and the assignee on the other, and the chancellor decided that the children were entitled to the cash value of the policy at the time it ceased to be kept alive by the mother, and that the residue of the money due on the policy should be paid over to the assignee.

On the other hand, in the case of *Trough's Estate*, 8 Phila. 215, where Trough, having taken out a policy on his life, assigned the same, while solvent, to a trustee for the benefit of his children, and becoming insolvent thereafter, still continued to pay the premiums, in a contest for the insurance money between the children and Trough's creditors, the rule was laid down that the only claim the creditors could sustain would be the amount of the premiums paid by Trough to keep the policy alive after he became insolvent.

The object of such rules being to do exact justice between the contending parties and to distribute the fund according to their

rights, it appears to us that neither of the above rules accomplishes the object ; and inasmuch as the insurance money in contest in this case was the product of all the premiums paid, we think a just distribution of it would be obtained by declaring that Mrs. Robison should be decreed to have so much of the fund as was produced by the payment of the premiums by her husband when solvent, and plaintiffs so much as the premiums paid by Robison when insolvent contributed to produce ; that is, that plaintiffs are entitled to recover the same proportional part of the whole insurance money that the premiums paid by Robison when insolvent bear to the premiums paid by him when solvent. Giving effect to this rule in the disposition of the case, and accepting the fact found by the court, that Robison after his insolvency paid \$342.05, as being correctly found, and the further fact, as shown by the record, that Robison had paid on two of said policies during his solvency premiums amounting to \$4,650, plaintiffs would be entitled to recover the sum of \$686.84, and Mrs. Robison the residue.

As plaintiff Pullis in the race of diligence was the first to file his bill, asking an appropriation of the fund to the payment of his demand, he has obtained a priority over the other creditors, and the said sum of \$686.84 should be applied on his debt. *George v. Williamson*, 26 Mo. 193. The judgment will be reversed and cause remanded, with directions to the Circuit Court to enter up a decree in conformity with this opinion, directing the receiver in whose hands the fund has been placed to pay first the costs of the suit, next the sum of \$686.84 to plaintiff Pullis, and next the residue to defendant, Mrs. Robison. All the judges concur.

Judgment accordingly.

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BUESCHING V. ST. LOUIS GASLIGHT COMPANY.

(73 Mo. 219.)

Negligence — dangerous premises — tenant—contributory negligence — burden of proof.

A tenant taking possession of demised premises with a dangerous opening or area at the street line, is bound to guard the same so as to secure persons using the street from falling into it.*

Contributory negligence is matter of defense, and the plaintiff in an action of negligence is not bound affirmatively to show that he was free from negligence. (See note, p. 511.)

ACTION of damages for negligence causing death of plaintiff's husband. The opinion states the case. The plaintiff had judgment at trial, which was reversed by the St. Louis Court of Appeals.

Broadhead, Saylack & Hanessler, for appellant.

Clive, Jamison & Day, for respondent.

HOUGH, J. This was an action against the St. Louis Gaslight Company, as owner, and one Barnes, the tenant in possession of a certain building on Pine street, in the city of St. Louis, for negligence in not guarding the entrance to an area or opening in front of said building, and abutting upon the sidewalk, into which it is alleged the plaintiff's husband fell on the night of January 22, 1876, and was thereby killed.

The building in question is located on the north side of Pine street and on the west side of and adjoining an alley which runs north and south through the block lying between Second and Third streets. All the houses on the north side of Pine street between the alley and Third street are set back two feet and six inches from the north line of the sidewalk. The opening in question is about eight feet long, east and west, three feet nine inches deep and two feet five inches wide, and is therefore outside the sidewalk and on defendant's ground; and being designed to furnish means of descent to the cellar or basement of their building, had five straight stone steps and two winding ones at the bottom leading to the base-

* See *Nash v. Minneapolis Mill Co.* (24 Minn. 501), 31 Am. Rep. 349.

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ment door. The top step which is eight inches wide is flush with the east wall of the building, which is on the west line of the alley, and the descent into the cellar therefore begins just eight inches from the east wall. This opening is guarded by a railing at the west end and had also a railing on the south side extending to within two feet of the east edge of the top step, so that persons might step from the sidewalk on the second step. But the eastern end or entrance had no guard or barrier of any kind. There are several openings of the same kind in the block, and the testimony tended to show that similar openings existed throughout the city.

Buesching, at the time of his death, kept a saloon on Chestnut street between Main and Second streets, two blocks distant from the place of the accident, and lived with his family over his saloon. He was an industrious man, attentive to his business, and though in the habit of drinking, was not a drunkard. He was last seen alive by the barber at a shop on Olive street near Second, who knew him well and had been in the habit of shaving him every Saturday night for two years. At 9 o'clock P. M. of January 22d, which was Saturday, Buesching went to this barber shop and was shaved. He waited until the shop was closed and asked the barber to take a drink with him, which he declined to do. It does not appear that deceased took a drink and the testimony is that there were no saloons then open in that vicinity. The barber testified that when he was at the shop he was rational and knew what he was about. He could not say that he had been drinking for he saw no effects of it. He further testified: "He might have been drinking but I never saw him so intoxicated as not to be able to take care of himself and to walk, and never saw him stagger, and never saw him affected by liquor." They walked together from the shop to the corner of Second and Olive streets where they separated at about a quarter to ten o'clock, the barber going west on Olive and the deceased going north on Second. At the time it was thawing and raining, the walks were muddy and slippery, and Buesching was wearing low-cut slippers and had neither overcoat nor umbrella. He was never seen alive afterward.

On the next morning about seven o'clock he was found dead at the bottom of the cellar entrance in front of the gas company's building, lying on his back with his feet up the steps and his head against the basement door, with his neck broken and no marks of personal violence on his body. His watch and other valuables were

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on his person. His pantaloons were unbuttoned for a short distance in front and there was a urinal in the alley. There was a gas lamp burning that night on the opposite side of the street, thirty-four feet from the cellar-way in which Buesching was found. He had kept a saloon for six years at the corner of Second and Pine streets, half a block distant from this cellar-way, which had then been there for nearly twenty years. The plaintiff recovered judgment in the Circuit Court, which was reversed by the Court of Appeals, the latter court holding that on the facts stated the Circuit Court should have taken the case from the jury. The plaintiff brings the case here by appeal.

As the opening was upon defendants' own ground, although abutting upon the sidewalk, they had an undoubted right, in the absence of any law or ordinance to the contrary, to make and maintain it, but it was their duty to so guard the entrance as to render it secure for persons using the sidewalk, and they are liable to all persons lawfully using the sidewalk, who, while exercising ordinary caution, are injured thereby. This, we think, is well established by the authorities. In *Cooley on Torts*, page 660, it is said: "If one make an excavation so near the line of the highway, that one lawfully making use of the highway might accidentally fall into it, his duty to erect guards as a protection against such accidents is manifest, and he will be responsible for injuries occasioned by his neglect to do so." In *Shearman & Redfield on Negligence*, section 360, it is said: "Where an area is excavated by the side of the street, it must be surrounded by a secure fence, and where an opening is made into a cellar, it must be covered with a lid or flap of ordinary and sufficient strength. The want of such guards creates a public nuisance, for which the tenant is liable to any person injured thereby, even though the premises were leased in that condition." If the owner lets the premises with the nuisance upon it, and the tenant allows it to remain, they are jointly and severally liable for injuries occasioned thereby. *Id.*, § 361. In *Coupland v. Hardingham*, 3 Camp. 398, it appeared that there was an area in front of defendant's house, which was descended to by three steps from the street, and from which there was a door leading into the basement story of the house; there was no railing or fence to guard the area from the street, and the plaintiff passing by on a dark night fell into it and had his arm broken. The defense set up was that the premises had been in exactly the same situation as far back as could be re-

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membered, and many years before the defendant was in possession of them. Lord ELLENBOROUGH said that however long the premises might have been in this situation, as soon as the defendant took possession of them he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so, and the learned judge said, that the area belonged to the house, and it was a duty which the law cast upon the occupants of the house to render it secure. Thompson on Neg. 327.

In *Jarvis v. Dean*, 3 Bing. 467, the plaintiff recovered damages for injuries sustained by falling into an open, unguarded area adjoining the street, and no question was made as to his right of action. *Barnes v. Ward*, 67 Eng. Com. Law, 392 (9 Man. Gr. & S.), was an action under Lord CAMPBELL's act, brought by the administrator of Jane Barnes to recover damages for her death, occasioned by the failure of the defendant to properly guard, fence off and rail in a certain hole or area abutting upon the footway, into which while lawfully passing upon said footway, she slipped and fell. This case was most elaborately argued, and in consequence of doubts entertained by the court as to the duty of the defendant to fence off the excavation, a second argument was directed, and after the fullest consideration, and an examination of the original *nisi prius* records in *Coupland v. Hardingham* and *Jarvis v. Dean*, as to the location of the areas in question in those cases, the court said: "It appears to us after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road." So, also, in the case of *Hadley v. Taylor*, L. R., 1 C. P. 53, ERLE, C. J., said: "The plaintiff seeks compensation for an injury which he has sustained through falling into a hole on the defendant's premises. The hole was not upon the public highway, but distant from it about fourteen inches. I think however, the defendants (assuming them to be in possession of the adjoining premises) would be liable for a nuisance to the highway, if the excavation were so near to it that a person lawfully using the way and using ordinary caution, accidentally slipping, might fall into it." To the same effect are *Snow v. Provincetown*, 120 Mass. 580: *Bush v. Johnson*, 23 Penn. St. 209, and *Temperance Hall Asso. v. Giles*, 33 N. J. 260. In the case last cited, it was held that in order to show that the area in question was not a nuisance, it was not competen..

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to prove that over ten thousand persons had passed and repassed the area every year after it was made, without accident ; that such areas were common in the city ; and that it was the custom to protect them as the area in question was protected. There can be no question then, as to the liability of the defendants, if the deceased was, at the time he was precipitated into the opening, in the exercise of ordinary care.

It has been repeatedly decided by this court that it is not incumbent upon the plaintiff, in the first instance, to show that he was free from negligence, or in the exercise of ordinary care at the time of receiving the injury complained of, but that the concurring negligence of the plaintiff is a matter of defense, and the burden of showing it is therefore upon the defendant. If however it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury, it would be the duty of the court to take the case from the jury, by declaring as a matter of law that the plaintiff cannot recover.

We are thus brought to a consideration of the main question in this case: Has the Court of Appeals erred in deciding that the Circuit Court should, on the plaintiff's own testimony, have declared that the plaintiff could not recover? The point is not without difficulty. Two main facts however are clear: First, that the defendants were guilty of negligence in leaving the opening unguarded at its entrance. Second, that the plaintiff's husband was found on the morning of January 23, 1876, lying on his back with his neck broken, his head and shoulders at the bottom of the passage, and his feet and limbs resting on the steps above him, his body free from any marks of personal violence, and his watch and money and other valuables unmolested. We think it a fair and reasonable inference from the surroundings and condition of the deceased when found that he was not murdered, although the facts proven do not absolutely exclude the possibility of murder. There is no presumption of law that deceased committed suicide, and if his surroundings when found did not indicate how he came to be there, the presumption would be that it was the result of accident. *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121. It is not shown how, or at what hour he got there. No witness saw him fall, but his position and condition when found would indicate that he did fall, either sidewise or backward, head-long down the steps. The physical

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facts just mentioned, taken by themselves, are sufficient to warrant a jury in drawing such an inference as to the manner of his death. Courts and juries constantly act upon such testimony, and we do not understand its sufficiency for this purpose to be denied by the counsel for the defendants.

Taking it for granted then that Buesching fell into the opening, or what is tantamount thereto, that there is testimony from which that fact could be found, the next question is, is there evidence on which a jury should be permitted to find that at the time of his fall the deceased was in the exercise of ordinary care. The argument of defendants' counsel is, that if the deceased saw this entrance he was negligent in not avoiding it. If he did not see it, he was negligent in not looking, as it was in plain view and well known to him, and had been for years before; that ordinary care and prudence required him to look to his steps, and had he done so he could not have failed to see it; and therefore it follows that he came to his death by reason of his own negligence contributing thereto. It does not appear from direct and positive testimony that the deceased knew of the existence of the opening in question; one witness does indeed say "he knew of the condition of the street, for it had been in the same condition for ten or fifteen years," but this statement plainly imports no more than that the witness supposed he knew it because it had existed for ten or fifteen years. Knowledge on the part of the deceased may however be inferred from the fact that he lived for several years on the same street, within half a block of the opening. But this is an inference of fact favorable to the defendants, which it is not permissible for the court to draw, in passing upon a demurrer to the evidence. Such inference could only be drawn by a jury after the submission of the cause to them on the merits. In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor, and if when received in this light, it is insufficient to support a verdict in his favor, the demurrer should be sustained. *Wilson v. Board of Education*, 63 Mo. 137. But the court is not at liberty, in passing on such demurrer, to make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions of law or inferences of fact in favor of the plaintiff; that would clearly be usurping the province of the jury. So that if it were essential, in

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order to sustain the demurrer to the evidence, that it should appear to the court at the close of plaintiff's case that the deceased had knowledge of the opening in question, inasmuch as such knowledge could only appear by way of inference in favor of the defendant from facts which were proven, the demurrer could not be sustained. In weighing the argument of the defendants, then the element of previous knowledge of the nuisance is to be eliminated.

It may be proper however to remark in this connection, that the rule which obtains between master and servant, where there is knowledge on the part of the latter of dangerous defects in tools, apparatus, machinery, structures or grounds, furnished by the master, with which, or in which, as the case may be, the servant is required to work, is inapplicable in its fullest extent to the relation which exists between the traveller upon a highway and the proprietor of the adjacent lands, who maintains a nuisance thereon abutting upon the highway and likely to produce injury. In the former case, unless there is complaint by the servant and a promise to repair by the master, the servant is held to assume the risk if he remains in the master's employment. In the latter case, no person is required to abandon a convenient or accustomed route of travel in a city, because of dangerous excavations near the highway, unless the use of the way under such circumstances would be inconsistent with the exercise of reasonable and ordinary care. *Barton v. Springfield*, 110 Mass. 131; *Snow v. Provincetown*, 120 id. 580. And the traveller, if injured thereby, may recover, notwithstanding his knowledge of the existence of the nuisance, provided he was at the time using ordinary care. *Smith v. The City of St. Joseph*, 45 Mo. 449; *Thomp. on Neg.*, 1203, 1204, 1205, 1206, §§ 52, 53; *Shear. & Redf. on Neg.*, § 414.

The argument for the defendants then, with the element of previous knowledge eliminated, stands thus: As the opening was not concealed, but was obvious to the sight, the deceased was guilty of negligence if he did not see it, and if he did see it, he was guilty of negligence in not avoiding it. These propositions are stated as abstract propositions, which must, if true, obtain in all cases, and not in this case only, for the circumstances under which Buesching failed to see the cellar-way, or seeing it, failed to avoid it, are not shown by the testimony. These propositions then, if they are true, and mean any thing as applied to this case, mean that Buesching should, no matter what the circumstances surrounding him at the time, have seen the hole into which he fell, and seeing

it, should, no matter how great the difficulty of so doing, have avoided it. If such be the law, it is quite plain that there never could be a recovery for an injury occasioned by an obvious defect in a highway. But such is not the law. The law is that the deceased was guilty of negligence if he did not see it, provided he would have seen it by exercising ordinary care; and seeing it, he was guilty of negligence in not avoiding it, provided he could have avoided it by the exercise of ordinary care.

Now the law presumes that the deceased was in the exercise of ordinary care; and this presumption is not overthrown by the mere fact of injury. *Shear. & Redf. on Neg.*, § 44; *Hoyt v. City of Hudson*, 41 Wis. 105, 111; s. c., 22 Am. Rep. 714; *Gay v. Winter*, 34 Cal. 153. This presumption of due care always obtains in favor of a plaintiff in an action to recover damages for an injury sustained by him through the alleged negligence of another. If it were otherwise, the decisions of this court, which require the defendant to plead and prove as a defense the contributory negligence of the plaintiff or deceased, would be absurd. Slight circumstances however in the absence of direct evidence may overcome the presumption of freedom from negligence which the law indulges. The habits and character of the person injured, his mental and physical condition when last seen before the injury, the location and character of the object or instrumentality causing the injury, and the nature of the injury itself, are all to be taken into consideration by the jury in determining whether he was free from fault when injured.

In the case before us, there is no testimony whatever showing what the conduct of the deceased was when he fell into the opening, and the presumption of law being that he conducted himself with due care, it was for the jury to draw such inferences from the facts in evidence as would overthrow that presumption, and not for the court. *Barton v. Railroad Co.*, 52 Mo. 253; *Fernandes v. Sacramento R. R. Co.*, 52 Cal. 45; *Hoyt v. City of Hudson*, 41 Wis. 105, 111; s. c., 22 Am. Rep. 714; *Gay v. Winter*, 34 Cal. 153. If it clearly appeared from the testimony of the plaintiff, without any contradiction, that the deceased was, when last seen, so intoxicated as to be incapable of exercising ordinary care, the Circuit Court might very properly have taken the case from the jury. But such is not the testimony. We are of opinion that the Circuit Court did right to submit the case to the jury.

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[Omitting a minor consideration.]

It is unnecessary to comment upon the instructions given for the defendants. What we have said will indicate how far we deem them correct. The judgment of the Court of Appeals will be reversed, and that of the Circuit Court affirmed.

Judgment accordingly.

The other judges concur, except SHERWOOD, C. J., who did not sit.

NOTE BY THE REPORTER.—See, to same effect, *Prideaux v. City of Mineral Point*, 68 Wis., 513; s. c., 28 Am. Rep. 558; also note, p. 563.

The following recent cases should be consulted in connection with the above:

In *Baltimore and Ohio Railroad Company v. Whitacre*, 35 Ohio St. 627, it was held, that in an action for injury, occasioned by negligence, where the circumstances require of plaintiff the exercise of due care to avoid the injury, and his testimony does not disclose any want of such care on his part, the burden is upon defendant to show such contributory negligence as will defeat a recovery. But if plaintiff's own testimony in support of his cause of action raises a presumption of such contributory negligence, the burden rests upon him to remove that presumption.

To the same effect, *Paducah & Memphis R. Co. v. Hochl*, 12 Bush, 44; *Northern Cent. R. Co. v. State*, 31 Md. 357; *Texas & Pacific Ry. Co. v. Murphy*, 46 Tex. 356; *Hocum v. Wettherick*, 22 Minn. 152; *Kansas Pacific Ry. Co. v. Pointer*, 14 Kans. 37. In the last case the court said: "It seems to us also correct to hold, that the *onus probandi*, as to the negligence of the plaintiff, is on the defendant; that if the record shows negligence on the part of the defendant, and is silent as to the conduct of the plaintiff, it makes out a case for recovery. We are aware of contrary decisions, and that in some States it is held that the burden is on the plaintiff to show affirmatively that he exercised due care, and was without fault. But if it is shown that a party has done wrong, and caused injury thereby, is not a *prima facie* case for compensation made? Logically, the wrong-doer should always compensate, and the wrong and the injury always entitle to relief. When the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation. This is not strictly justice. The wrong-doer causing injury ought not to be released from making any compensation, simply because the injured party is also a wrong-doer, and helped to produce the injury. But many considerations, especially the difficulty of correctly apportioning the damages, and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule so universally recognized, that where the wrong, the negligence of both parties, contributes to the injury, the law will not afford any relief. But if the wrong-doer ought always to compensate for the injury he has wrought, and is relieved from the obligation to compensate only by the fact that the wrong of the injured party helped to cause the injury, it is incumbent on him to show such wrong. It is matter of defense, to avoid the consequences of his own wrong." And so, in *Gay v. Winter*, 34 Cal. 158, the court said: "While we admit the general rule to be that the burden of proof is on the plaintiff to make a case which will leave him blameless, we do not understand that it follows that he must prove affirmatively, in all cases, that he exercised ordinary care and diligence. In the absence of any direct proof, we are of the opinion that the jury are at liberty to infer ordinary care and diligence on the part of the plaintiff from all the circumstances of the case—his character and habits, and the natural instinct of self-preservation. To hold otherwise, would be in effect to presume negligence on the part of one in excuse of negligence on the part of another." This is the doctrine of the United States Supreme Court, where it is held that the plaintiff makes out his case by showing the defendant's negligence and his own injury in consequence thereof, and imposes on the defendant the burden of proving any circumstances showing contributory negligence. *Railroad Co. v. Gladmon*, 15 Wall. 401. The modern Eng-

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lish cases hold to the same effect. *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 id. 546; *Martin v. Grand North R. Co.*, 16 C. B. 179. In *Louisville, etc., R. Co. v. Goetz's Admin.*, Kentucky Court of Appeals, June, 1881, an action for the death of one killed at a crossing of a railroad and highway, held, "that while those on the highway, when about crossing a railway track, must exercise proper diligence and care with reference to their own safety, where there is an absence of evidence as to the care exercised by the party injured, it is not to be presumed that the deceased recklessly or carelessly imperiled his own life, or entered upon the track of the road knowing of the train's approach. If the presumption of negligence arises from the mere fact that the deceased was killed on the track, at a place where he had the right to be, it must necessarily defeat a recovery in all such cases unless it should appear that those in charge of the train, after discovering the dangerous condition of the party injured, could by the exercise of ordinary care have avoided the impending injury."

In *Tetzel v. Hilsendegen*, 44 Mich. 461, the court said: "When one sues to recover damages for a negligent injury, the gravamen of his complaint is that he has been damaged by the wrongful and negligent action of the defendant without having contributed thereto by negligent conduct of his own. The absence of contributory negligence is therefore a part of his case, and it is quite proper to say that he should show that he acted with due care. *Le Baron v. Joslin*, 41 Mich. 313. But this only requires of him that he should put in evidence the facts and circumstances attending the injury, and if these show negligent conduct in the defendant from which the injury followed as a direct and proximate consequence, and do not show any contributory negligence in the plaintiff, a *prima facie* case for a jury is made out. He cannot be required to go further than this in negating his own fault, and in many cases where there are no eye-witnesses, it would be impossible. Nor is it necessary that the absence of contributory negligence should be shown beyond cavil or question. If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion. In this case there were no eye-witnesses, and the injury resulted in death. The plaintiff sues as administrator of the person killed. There was some evidence of negligence on the part of the defendant, and there was some ground for an opinion that the intestate was negligent also. But the plaintiff put in such proofs of the attendant facts as were attainable under the circumstances, and from these it was by no means clear that the intestate was in fault at all. There was room for the conclusion that he was not. We think the case ought to have gone to the jury."

On the other hand in *Riceman v. Havemeyer*, 84 N. Y. 647, the deceased was, at the time of the accident causing his death, in the employ of defendants as assistant-engineer in their sugar refinery. In the basement of the refinery were two rows of tanks with a flagged passage-way two feet six inches wide between them. At one point there was a gutter across this passage-way, a foot above it, with a block on either side to assist in getting over it. The deceased went through this passage-way to examine a pump which was out of repair, and in returning fell into a tank containing hot sugar syrup, which was uncovered, receiving injuries causing his death. No one saw the accident. The deceased had been in defendants' employ for two days and had during that time been to and fro over this passage-way. He had been over it five times just before the accident; at that time a fellow-servant went over safely, just ahead of him. The way was well lighted. The deceased had been especially charged to be careful and not fall into the tank. Held, that plaintiff failed to show directly or inferentially that her testator was free from contributory negligence, and that a refusal to nonsuit was error. The court said: "To show that it was possible for the fall to have happened without negligence is not to give ground that it thus happened. The rule, that either by direct proof or by circumstances attending the injury, the jury must be authorized to find affirmatively that the person injured was free from fault helping to the mischance, or the action can not be maintained must be applied." Citing *Reynolds v. N. Y. Cent. R. Co.*, 58 N. Y. 248. And in *Cordell v. N. Y. Cent. & H. R. R. Co.*, 64 id. 535, the court said: "Care on the part of one seeking to hold another liable for neglect must be established by proof. Where there is no proof of such care the court should nonsuit. * * Absence of negligence will never be presumed." But in these cases the circumstances as conclusively showed contribu-

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tory negligence as in the *Riceman* case, and there is nowhere in the New York cases any express overruling of the earlier *Button* and *Johnson* cases, quoted in the note, 28 Am. Rep. 564, 565. We think the following is the rule deducible from the New York decisions: If on the plaintiff's affirmative evidence it clearly appears that he himself was materially negligent, he may be nonsuited; otherwise, the defendant, assuming that negligence on his part is shown, must give his proof. If on the whole case it clearly does not appear that the plaintiff was free from negligence, he may be nonsuited; but if the evidence is conflicting and doubtful, it must go to the jury. For example, in *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622, it was claimed that the deceased fell through the open draw of the defendant's bridge, but there being no direct evidence of absence of negligence on her part, the plaintiff was nonsuited. This was set aside, the court observing: "It was incumbent upon the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the death of the deceased. But it needs not that this be done by the positive and direct evidence of the negligence of the defendant, and of the freedom from negligence of the deceased. The proofs may be indirect, and the evidence had by showing circumstances from which the inference is fairly to be drawn, that these principal and essential facts existed. When from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and may be differently made by different minds, it is for the jury to make them; that is to say, when the process is to be had at a trial of ascertaining whether one fact had being from the existence of another fact, it is for the jury to go through with that process." *Justice v. Lang*, 52 N. Y. 323.

"Now it would be prejudicial to the defendant upon another trial for us to particularize the facts shown on this trial, from which inferences could be made that the intestate came to her death from falling into the water through the draw-opening of the defendant's bridge, that she thus fell without negligence on her part, and through negligence on the part of the defendant; and for us to set forth what legal probabilities those facts are capable of establishing. It is not necessary to warrant us in adjudging that there was error in granting the nonsuit, for us to be convinced that the legal probabilities are so strong as that the plaintiff is entitled to a verdict. What we have to arrive at is this, that there were facts in this case which were not so weak as to give no support, in some fair and sound minds, to such legal probabilities, so weak as that the law will not tolerate that a verdict should be founded upon them. We are not to be able to say that the facts and the inferences to be had from them are enough to convince our own minds that the intestate died there, without negligence on her part and by the negligence of the defendant. What we are to be able to say is this, that the case is not so clear against the plaintiff as that there is no room for doubt; that there are facts and circumstances which are proper to be submitted to the consideration of the triers of fact." Two judges dissented.

Very recently there has been a tendency in the States where it is held that the burden of proof is on the plaintiff to show himself free from negligence, to rule that this fact need not necessarily be proved by affirmative testimony, but may be inferred from all the circumstances of the case, which being proved, "if they show nothing in the conduct of the plaintiff, either of act or neglect, to which the injury may be attributed, in whole or part, the inference of due care may be drawn from the absence of all appearance of fault." *Mayo v. Boston, etc., R. R. Co.*, 104 Mass. 137; *Park v. O'Brien*, 23 Conn. 339. So in *Smith v. Boston Gaslight Co.*, 129 Mass. 318, an action was for injury to a child of five years, from the inhalation of gas escaping from defendant's pipes, it appeared that plaintiff and his mother slept in a room adjoining a court in which the pipes from a crack in which the gas escaped were laid; that the mother was found dead and plaintiff insane; that the accident took place in the night; that there were no gas fixtures in the room occupied by plaintiff, and there was no evidence that the mother had notice of the escaping gas or was conscious of its presence in time to take precautions against its deleterious effect; that on the day before the accident there was no smell of gas in the court; that the mother was a sober and prudent woman. *Held*, that there was evidence sufficient to sustain a verdict in favor of plaintiff for injury by the escaping gas. "The burden was upon the plaintiff to show that he and his mother were in the exercise of due care in respect to the occurrence from which the injury arose. But this, as was said in *Mayo v. Boston & Maine Railroad*, 104 Mass. 140, although in form a proposition to be established affirmatively, need not be proved by affirmative testimony addressed directly to its support. It

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may be shown by evidence which excludes fault. And in the case at bar, there was nothing which excluded the inference that both mother and child on that night went to bed and to sleep in the usual manner with nothing to indicate that there was unusual exposure to injury, and that they were suffocated in their sleep by the gas which escaped from the defendant's pipes. If this were so, they were clearly in the exercise of such care as prudent people ordinarily use under circumstances of similar exposure to injury from hidden and unsuspected causes. *Craig v. New York, etc., Railroad*, 118 Mass. 437; *Commonwealth v. Boston & Lowell Railroad*, 128 id. 61; *Hinckley v Cape Cod Railroad*, 120 id. 257." So in *Com. v. Boston & Lowell R. Co.*, 128 id. 61, an indictment of a road corporation, for killing four persons not passengers, there was evidence that three of the persons had been on an excursion in a steamboat, which on its return at night, stopped at a pier two thousand feet long, the outer part of which was one hundred feet wide, and the part towards the shore, for the distance of thirteen hundred feet, was twenty-six feet wide and built on piles; that there were two railroad tracks on the pier, the rail on the east side being so near a box, three feet high, covering a water-pipe on that side, that when a train of cars was on the east track there was only a space of from five to seven inches between the box and the cars; that the three persons were seen to leave the boat and to go with a crowd of persons towards the shore end of the pier; that they were again seen with the fourth person, who was the son of two of them and who had not been on the excursion, as a train of cars, which came upon the pier with great rapidity and without due warning, was rolling them round and round between the side of the cars and the box, and that their bodies were soon after found under the cars; that some persons escaped by getting on to the box, and one by hanging on the outside of the pier. *Held*, that there was sufficient evidence to warrant the jury in finding that all the persons killed were in the exercise of due care at the time of the accident.

The court said: "If there is a sufficient disclosure of facts the mere absence of fault may be sufficient." So, in *Way v. Ill. Cent. R. Co.*, 40 Iowa, 345, the court said: "The court in substance instructed that plaintiff is not required to produce direct and positive testimony, showing just what the deceased was doing at the instant that he received the injury causing his death; that the law requires only the highest proof of which the particular case is susceptible; and that the jury might take into consideration, in weighing the evidence, the hazardous nature of the work in which brakemen are employed, and give due weight to the instincts and presumptions which naturally lead men to avoid injury, and preserve their own lives. It is objected that this shifts upon defendant the burden of proving the contributory negligence of the deceased. We do not think the instruction vulnerable to this objection. The instincts prompting to the preservation of life are thrown into the scale as evidence, like the presumptions of sanity and innocence. But when the whole evidence is considered, these instincts included, the plaintiff cannot recover unless the preponderance of the evidence is in his favor."

The text-writers are uniformly, we believe, in favor of the doctrine of the principal case. *Shearman and Redfield* (Neg., § 44), say: "Our own view of the question agrees almost entirely with that expressed by Duer, J., in the New York Superior Court," in *Johnson v. Hudson R. R. Co.*, 5 Duer, 21. "What possible ground of distinction can there be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are in *pari delicto*? Yet we are not aware of any case in which it has been held that the plaintiff in such action must assume the burden of showing himself free from fault. The reason why the plaintiff is not required to prove these negative circumstances is that they are presumed, as in accordance with the natural order and general state of things; and we think there is just as well established a presumption that every person uses ordinary care. Certainly that presumption has always been held to exist in favor of a defendant, and there can be no good reason for making a distinction unfavorable to plaintiffs. Such a presumption seems indeed almost necessary, since presumptions are founded upon the occurrence of the facts presumed in the majority of cases, and it would be a contradiction of terms to say that the majority of men in a civilized community do not take ordinary care of themselves."

Mr. Thompson says (2 Neg. 1173): "It would seem therefore to be a matter of defense, and that it would devolve upon the defendant to prove it." Wharton (Neg.) says

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"No doubt, where in an action for injuries caused by failure of duty on part of the defendant, such failure of duty and injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion." We assent to this on principle, but it cannot be said to be without doubt on the authorities. To the same effect, Add. on Torts, § 586.

We agree in the following conclusions of a writer in *Western Jurist* (vol. 15, p. 529): "We have endeavored to show that the proposition, whether the plaintiff was in the exercise of ordinary care, is not such a part of his case as must affirmatively appear to make out a *prima facie* case, there being a legal presumption of that fact existing in his favor. This being true, the effect is to make negligence on the part of the plaintiff an affirmative matter of defense, which it is incumbent on the defendant to prove, if relied on as a defense to the action. Where the proof on both sides applies to one and the same issue or proposition of fact, the party whose case requires the establishment of such fact has all along the burden of proof. But when *prima facie* evidence is given of such fact, and the adverse party, instead of producing proof to negative the same fact, proposes to show another and distinct proposition, which avoids the effect of it, then the burden of proof shifts and rests upon the party proposing to show the latter fact. * * * If however the facts of the plaintiff's case tend to convict him of concurrent negligence to a degree that may be considered by the jury as the cause of the injury, it is incumbent on him to clear himself if he can, for if he does not the defendant may rely thereon to defeat the action. This we believe to be the better rule according to reason, justice and public policy, and is supported by the greater weight of authority. The tendency in many of the States, where a contrary doctrine is held, has been to give a more liberal construction to the rule there observed; and it is to be hoped that time will bring about a final renunciation of the doctrine of the early decisions, which is unsound and unjust. That doctrine seems to have grown out of an improper construction given to the language of the court in *Butterfield v. Forrester*. Now there is nothing in that decision to justify such a doctrine. The facts proven presented a case of contributory negligence, and the court very properly held, that a plaintiff in an action of that kind could not recover, when it appeared that his own negligence had brought on the injury. The question as to the burden of proof in such cases was not raised. An examination of the English cases will show, that the same decision has not been so interpreted by the courts of that country, but that the rule there recognized is substantially the same as that observed by those of our own courts, which hold the burden of proof upon this question to be upon the defendant."

STATE V. WELCH.

(73 Mo. 284.)

Criminal law — larceny — lost property — ignorance of law.

On an indictment of a colored person for larceny of lost property, evidence of a general belief among colored people in that vicinity, that lost property with no marks to indicate the ownership belongs to the finder, is inadmissible.

CONVICTION of larceny. The prisoner was a colored man. The opinion states other facts.

James Limbird, for appellant.

D. H. McIntyre, attorney-general, for State.

HENRY, J. At the April Term, 1880, of the Holt Circuit Court, the defendant was indicted under section 1315, Revised Statutes 1879, and charged with having found \$30, the property of one Harrison Vandiver, and feloniously made way with and secreted the same, with intent then and there, feloniously, to convert it to his own use and benefit, with intent to defraud the owner of the same, and to which money defendant had not obtained the lawful title. The indictment is in the language of the statute, and aptly states the facts constituting the offense. The defendant was convicted and sentenced to two years' imprisonment in the penitentiary. From the judgment he has appealed.

There was evidence tending to establish the facts alleged in the indictment and fully warranting the conviction.

The defendant offered evidence to prove that it was a general belief among colored people in that county that money or property found, having no marks upon it to indicate its ownership, belonged to the finder. The court properly excluded the evidence. It is a principle as old as the common law that ignorance of the law is no excuse for its violation; and the law is the same for a colored as for a white person. We have not now a criminal code for the whites and a different one for the blacks. Under our present Constitution no law making such a distinction would be of any validity. Whart. Cr. Law, § 88, p. 1794, is cited as sustaining the proposition that taking possession of money and determining to keep it under an honest belief of a right to do so because found, is a good defense. There is no section 88, at page 1794, and the sections on that page do not relate to the subject under consideration, but section 87, page 87, asserts the general proposition that "ignorance or a mistake of fact is admissible for the purpose of negating a particular intention," and that "where a particular intent is necessary to constitute the offense, (*e. g.*, in larceny *animus furandi*, in murder malice), then ignorance or mistake is evidence to cancel the presumption of intent and to work an acquittal either total or partial." But in section 88, he says: "When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact is no defense." On this proposition some learned authors differ in opinion from Mr. Wharton. Bishop, 4 South. Law. Rev. (N. S.) 58.

However this may be, the section of our criminal code in question

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makes it a felony, in a finder of goods or moneys belonging to another, to convert them to his own use with intent to defraud the owner, or to make way with or secrete them with that intent; and proof of ignorance of the law, or that the finder believed that he acquired the title by finding the property, does not tend to disprove the intent to convert it to his own use. If he did the act with the double intent named in the section, it is no defense that in his ignorance of the general law he supposed that by finding he became the owner of the property.

It would be no defense that he was ignorant of the section under which he was indicted, which of itself apprises him that lost property does not belong to the finder, and why his ignorance of the general law to the same effect should avail him as a defense, is beyond our comprehension. By imposing a severe punishment upon the finder who converts to his own use the property of another, direct information is imparted that such does not become his by such finding. This is the import of the language of the section, and it is in harmony with a legal principle well established long before that section was enacted. It will not be contended that ignorance of the statutory provision will excuse its violation, and if ever ignorance of law could constitute a defense, it certainly will not do so when the identical section under which the accused is prosecuted informs him of the very principle of law of which he avers his ignorance. The instructions and rulings of the Circuit Court were in conformity with these views, and the judgment is affirmed.

All concur.

AMERICAN INSURANCE COMPANY v. BARNETT.

(78 Mo. 384.)

Insurance — misrepresentation, avoiding, in spite of adjustment.

After an insurance company had adjusted and promised to pay a loss, it discovered that the insured had misrepresented his title to the property in question, by means of which the policy, according to its terms, was avoided. *Held*, that the company might have its promise and the policy cancelled.*

* Compare *Stache v. St. Paul F. & M. Ins. Co.* (49 Wis. 89), 35 Am. Rep. 772.

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SUIT to cancel a fire policy and certificate of adjustment of loss. The opinion states the case. The defendant had judgment below.

E. J. Smith, for appell

W. P. Johnson, for respondent.

NORTON, J. This is a suit instituted in St. Clair county to cancel a policy of insurance issued by plaintiff to defendants, J. H. Barnett and Lizzie Barnett, and also a certificate of adjustment of loss under said policy, and a promise to pay \$710, given by plaintiff to defendants, and to restrain all the defendants from negotiating or disposing of said certificate of adjustment or promise to pay. The property insured was a dwelling-house situated on the east half of section 17, township 36, range 29, in Vernon county, and certain household furniture and wearing apparel in the same, the whole valued at \$1,000, the house being valued at \$475, and the personal property at \$525. The property was destroyed by fire; the loss was adjusted and compromised at \$710, for which the plaintiff gave, in writing, its promise to pay defendant J. H. Barnett on the 28th day of April, 1874. The evidence tended to show that defendants represented in their application for insurance that the fee simple title to the land, on which the dwelling-house was located, was in the assured. The evidence offered by plaintiff, from the records in the recorder's office of Vernon county, showed that at the time said application was made, and the risk was taken, the title to the real estate was in the United States, which title was acquired by one Garrett by patent from the United States dated in 1859, which however was not filed for record in the recorder's office of said county till the 10th day of December, 1873, some six months after the issuance of the policy of insurance to defendants; and that so far as was shown by said records the title still remained in said Garrett. Defendants offered no evidence. It was admitted by the pleadings that it was a condition of all the policies issued by plaintiff, and was so in said policy issued to defendants, Barnett and wife, that if any of the facts stated in the application were untrue said policy should be void. The court found for defendants, and dismissed the bill, and from this judgment plaintiff prosecutes his appeal.

The application for insurance, which was offered in evidence and improperly rejected by the court, showed that the fee simple title

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to the real estate was represented to be in Lizzie Barnett, the assured; the other evidence offered showed this representation to be untrue; and it was admitted by the pleadings that it was a condition of the policy that if any fact stated in the application were untrue the policy should be void. This being the state of the case, and the fact being that the untruthfulness of the representation as to title was not discovered till after the adjustment of the loss, the judgment of the court was clearly erroneous. The policy was unquestionably void as to the dwelling-house, and under the authority of the following cases, viz.: *Loehner v. Home Mutual Ins. Co.*, 17 Mo. 247; *Koontz v. Hannibal Savings & Ins. Co.*, 42 id. 126, it should have been so declared, and defendants should have been restrained from the collection of so much of the promise to pay as was based upon the destruction of the house.

And under the authority of the above cases, as well as the following, viz.: *Gottzman v. Penn. Ins. Co.*, 56 Penn. St. 210; 51 Me. 110; 8 Gray 33; 25 Barb. 497; 5 Md. 165; 11 Cush. 280; if the further stipulation which counsel for plaintiff says was in the policy, was in fact in it, viz.: "That if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee or otherwise, is not truly stated, * * * then, and in every such case, this policy shall be void, and the assured shall not be entitled to recover from the company any loss or damage which may occur in or to the property hereby insured, or any part or portion thereof," plaintiff would be entitled to the full relief prayed for in the bill, and should this fact appear on a retrial of the cause in addition to the other facts adverted to herein, the court will enter such a decree as is above indicated. Judgment reversed and cause remanded, in which all concur.

WIGGINS FERRY COMPANY V. CHICAGO & ALTON RAILROAD CO.

(73 Mo. 389.)

Contract — public policy — exclusive employment of ferry — restraint of trade.

A railroad company needing a ferry to complete transportation at its terminus, agreed with a ferry company to give it all its ferrying business at that point, and not to employ any other ferry. The ferry company agreed to furnish the requisite facilities, and transact the business promptly and with dispatch. *Held*, not void as against public policy or in restraint of trade.

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ACTION for breach of contract. The opinion states the point. The plaintiff had judgment at the trial, which was reversed by the Court of Appeals.

Glover & Shepley, for appellant.

James O. Broadhead, John M. Woodson, and C. Beckwith, for respondent.

NORTON, J. [Omitting other matters.] When the fact is considered that defendant, with one terminus of its road at Chicago, and the other at a point on the Illinois shore of the Mississippi river opposite the city of St. Louis, was necessarily dependent, for the successful operation of its road and business, on the facilities which it might afford for the passage over said river of persons and property destined either for St. Louis or points beyond — or coming to it from St. Louis destined either to Chicago or to points intermediate and beyond, it was in the interest, not only of defendant, but of the public, that it should secure to itself these facilities. That these facilities were secured to defendant by the contract in question cannot be controverted, and that it had the power to make the contract by which it secured them is shown by Hutchinson on Carriers, section 145, and following sections, and by the case of *Wheeler v. San Francisco R. R. Co.*, 31 Cal. 46, where the authorities sustaining the power are extensively cited.

But it is insisted that defendant, in securing them, obligated itself to do what is forbidden by public policy, and what is in restraint of trade, by agreeing that it “will always employ the said ferry to transport across said river all persons and property which may be taken across said river either way to or from the Illinois shore, either for the purpose of being transported on said railroad or having been brought to the said river Mississippi, upon said railroad, so that said ferry company * * * shall have the profits of the transportation of all such passengers, persons and property taken across said river either way by the said railroad company, and that no other than the Wiggins Ferry shall ever, at any time, be employed by the said party of the second part, or the assignee herein mentioned, to cross any passengers or freights coming or going on said road.” Keeping in view the fact expressed in the contract that one object in making it was to secure to plaintiff

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iff "the ferrying business between the Illinois shore and the Missouri shore opposite St. Louis of all passengers and freight carried, or to be carried," by defendant, and that the above stipulations were inserted to carry out this object, and construing the contract in its entirety, giving to the words employed therein their usual signification, without twisting them from their natural meaning in the relation they bear to the object referred to, we are of opinion that defendant bound itself to give to plaintiff for ferrying over the Mississippi river all passengers and freight brought by it to the Illinois shore opposite the city of St. Louis, to be crossed over to said city, and all passengers and freight taken from St. Louis for carriage by defendant on its road north-ward.

If the design of the contracting parties had been to limit the obligation of defendant to give to plaintiff for ferrying, and limit the right of plaintiff to have for ferrying only such freight as might go or come over Bloody Island, it should have been so expressed, and it could have been unmistakably expressed by the simple addition of the words "Bloody Island" to the words "river and Illinois shore," where they occur in the above recited clauses of the contract. This was not done. No words restricting the obligation of defendant to furnish freights for ferrying, or restricting plaintiff's obligation to ferry only such freights as might go or come to the Illinois shore over Bloody Island, are to be found in the contract, and we are not authorized by any rule to interpolate or insert in the contract words which the contracting parties themselves not only did not put there, but which, as we think, were intentionally omitted. The Wiggins Ferry Company, by virtue of its charter, and independent of the contract, had the exclusive right to ferry freights across the Mississippi river to and from Bloody Island, and the construction contended for by counsel, that the contract secured to plaintiff the right to demand of defendant only such freight as it might bring to a point on Bloody Island, would involve the unreasonable conclusion that plaintiff was willing to transfer, and in fact did transfer to defendant property rights estimated by one witness to be of the value of \$130,000, to secure to itself a right which it already had and of which defendant could not deprive it.

If the contract is to be viewed in the light of the circumstances surrounding the parties at the time of its execution, the construction we have given it is fortified and sustained. It is shown by the evidence that at the time it was entered into there were three ferry

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companies doing business under their respective charters from the Illinois shore opposite St. Louis, viz.: The St. Clair County Ferry, south, and the Madison County Ferry, north of the Wiggins Ferry Company. According to the evidence of Mr. Bisdon, the Wiggins Ferry Company had a frontage on the Illinois shore of said river opposite St. Louis, of about two and a half miles; this frontage included not only Bloody Island, but also extended south of it and north of it up to or near the line dividing the counties of St. Clair and Madison, and within 3,200 feet or about five-eighths of a mile of the Madison County Ferry at the town of Venice. The Wiggins Ferry Company had by its charter the exclusive privilege of maintaining and operating a ferry to and from any point or points on this frontage, and the other two the same right confined to the frontage on said shore respectively owned by them. On the other hand defendant had the right to give to either of these companies the ferrying across said river brought by it to the Illinois shore. If it brought its freight to said shore at any point embraced within the said frontage of plaintiff, if passed over the river from such point, it could only be done by plaintiff, and if brought to said shore at any point embraced within the limits of either the St. Clair County Ferry or Madison County Ferry if passed over the river from such point, it could only be done by the company in whose limits such point was embraced. In this condition of things there was no possible motive or inducement for the Wiggins Ferry Company to enter into a contract by which it would get nothing more than it already had a right to. The right of said company to ferry freight from so much of the Illinois shore as was included in its frontage having already been secured to it by its charter, its evident purpose was to obligate defendant to bring to such frontage all freight carried by it requiring ferry transportation across the said river opposite St. Louis, and that such was the extent of the obligation assumed by defendant we have already seen.

If, as argued by counsel for plaintiff and conceded by counsel for defendant, the Chicago & Alton Railroad Company was authorized by its charter to carry passengers and freight to St. Louis and empowered to employ and use boats for that purpose, it was its duty to do so, and the public had a right to demand of defendant the performance of this duty in such manner as not to hamper trade, but so as to secure the transit over the river with facility and dispatch of all persons and property which either trade or the public inter-

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est might demand. This much and no more the public had a right to demand, and if it was met by the contract in question it cannot be held to be in contravention of public interest, because the public would get under it all that it had a right to. It was no concern of the public what particular ferry should be employed by defendant as an instrumentality for the prompt passage over the river of all freight and passengers requiring such transit, provided the one employed was in all respects sufficient to accomplish such purpose without imposing any additional burdens on the shipper. The obligation of plaintiff required it to "furnish and maintain wharf and steam ferry boats sufficient to do with promptness and dispatch all the ferrying of passengers and freight requiring it." What more than this could be demanded? What right of the public was disregarded by defendant agreeing alway to employ a company which it had thus obligated?

If on the other hand the southern terminus of defendant's road was on Bloody Island it owed no duty to the public to carry freight or passengers beyond such terminus, and in making the contract in question it neither abandoned nor violated any duty to the public, because it owed it none. While defendant could not be compelled to carry beyond the terminus of its line, it nevertheless might contract if it chose to do it for the carriage of freight beyond such terminus and for this purpose make a valid contract with the connecting carrier, and if it elected to make such contract it would be bound by it. Hutchinson on Carriers, §§ 147, 151, and authorities there cited; *id.*, § 317; *Paradine v. Jane*, Aleyn, 26, 27.

The only element of restraint of trade to be found in the obligation of defendant is that it will never employ any other ferry but the Wiggins Ferry to transport freight from the Illinois shore opposite the city of St. Louis, or sent to it from said city. This restriction is not general as to space but only partial and special, and it is only when a contract is granted for general restraint of trade that it will be held illegal and void; but it is otherwise if the restraint be partial and reasonable. *Bowser v. Bliss*, 7 Blackf. 344; *Peltz v. Eichele*, 62 Mo. 171; *Leake on Con.* 735, 736. The space in which the restriction is to operate is limited to the Illinois shore opposite the city of St. Louis, and is only a partial restraint in that space, the restriction being not that defendant will not employ any ferry at all, but that it will only employ that of plaintiff. We cannot say from any thing appearing in the contract that such limi-

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tation is unreasonable, and it is not therefore obnoxious to the rule.

While holding the contract as we have construed it to be valid, yet if it is shown by extrinsic evidence to be in conflict with public policy, to that extent it must yield and give way, and it is for the defendant affirming it to be so to show it. The salutary rule that a contract against public policy or interest will not be enforced, was adopted to conserve the best interests of society and the State, and a party who invokes it as a shield behind which to hide and protect himself against the damages attachable to the breach of a contract, especially when such party is in the full and free enjoyment of all the fruits of the contract, must make it clearly manifest to the mind of the court that the obligations imposed by it are condemned by the rule. In the case of *Bryant v. Fairfield*, 51 Me. 146, it was held that it is not for a party who retains the consideration of the contract to invoke the rule that the contract is against the policy of the law. While not willing to go to the extent of that case, and say that a party in the enjoyment of all that he was to get in consideration of a promise made by him to another should not be allowed, when sued for a breach of such promise, to plead that it was against public policy, we may safely say without infringing upon any rule of common honesty, justice or right, that to make such plea effectual he should restore or be required to restore all that he received as a consideration for the promise which he thus seeks to avoid. The fact that defendant entered into the possession of the lands it was to get under the contract, immediately after its execution, laid its track, built its depot, and has ever since had the full and uninterrupted enjoyment of the same, is conceded; the fact that from 1864 up to May or June, 1869, no discovery had been made that the contract in question was against public policy, and that during that time defendant gave to plaintiff for ferrying all passengers and freight going to or coming from St. Louis, on or for its road, is also conceded.

The fact that since that time all freight carried by defendant loaded in its cars, and transferred without breaking bulk, was transferred, not by the Wiggins but by the Madison County Ferry, is also conceded, and it is this car transfer so made of which the plaintiff complains and which it sets up as a breach of defendant's contract. But the fact that such transfer constituted a breach of the contract is denied by the defendant, who claims, first, that the contract did not embrace car transfer, that such method of transfer

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was not used by plaintiff at the time it was entered into, and was not therefore contemplated by the parties; second, that if embraced, the public interest demanded car transfer at the Madison County Ferry which could not be met by the Wiggins Ferry, and that in this conflict between the obligation of defendant and public interest the obligation yields and ceases to be enforceable.

While it is true that plaintiff and defendant may be presumed to have contracted with reference to the condition of things existing at the time the contract was made, it is equally true that they must be presumed to have contracted with reference to the fact that if in the future other methods than those then in use for the transfer of passengers and freight from the rail terminus of defendant's road to plaintiff's boats, and improved methods in the construction of boats for the reception of such freight should be invented, and proved by trial to be more efficacious as to cheapness, safety and dispatch than those then in use, it would be the duty of plaintiff to adopt them upon the requirement of defendant. *Hutchinson on Carriers*, § 529; *Meier v. Penn. R. R. Co.*, 64 Penn. St. 225; s. c., 3 Am. Rep. 581. We think it cannot reasonably be claimed that if an improved method had been invented in applying steam power in propelling ferry boats, whereby the transportation of freight and persons would have been cheapened and facilitated, defendant, under the contract, could not have demanded its adoption, and that it would not have been the duty of plaintiff to have complied with it. The obligation assumed by plaintiff to ferry all freight requiring to be ferried is unrestricted and broad enough to cover freight brought on to its boats loaded in cars propelled by steam, as well as freight brought to them loaded in wagons drawn by horses and mules. If the ferrying of freight loaded in cars without breaking bulk had been demanded by defendant because it was cheaper, safer and more expeditious than transfer by parcels, it would have been the duty of plaintiff to have provided boats to meet the demand. If the defendant, in the interest of the public, and its own, desired to avail itself of such improved method, it should have signified its desire to plaintiff and afforded it an opportunity to furnish the proper facilities by conforming its boats to such method.

[Omitting other matters.]

The instructions given by the court show that the cause was tried upon a view of the case more favorable to defendant than that

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which we have taken of it, and upon full examination of the record we are unable to perceive that any error was committed against the defendant, and will therefore reverse the judgment of the Court of Appeals and affirm that of the Circuit Court, in which all the judges concur.

Judgment reversed.

McDERMOTT V. HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

(73 Mo. 516.)

Evidence — declarations of agent.

In an action against a railroad company by one of its employees for personal injury sustained by reason of the incompetence of a section foreman, evidence of the statement of the defendant's roadmaster, several days afterward, that the foreman was incompetent, is incompetent to show knowledge on the part of the company.*

ACTION of damages for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

Geo. W. Easley, for appellant.

Wm. S. Carroll, for respondent.

HENRY, J. The plaintiff was employed by defendant as a laborer on track repairs, and was injured, he alleges, in consequence of the negligence of one Dawson, defendant's section foreman, in having permitted a hand-car to be on the track when the track should have been clear for the passage of trains, and in negligently and carelessly ordering plaintiff to remove the car in the face of an approaching train. It is further alleged that Dawson was incompetent, and that the defendant had knowledge of that fact before the injury complained of occurred. It is also alleged that the company had negligently allowed piles of wood to be placed and remain close to the track, so as to render it unsafe and dangerous for the employees at work on the track; that the hand-car was struck by an engine of a train and thrown against the plaintiff, wounding him severely, and that his escape was prevented by the piles of wood at the side

* See *Hawkes v. Balt. & Ohio R. Co.* (15 W. Va. 628), 38 Am. Rep. 825, and note, 829.

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of the track. He sued the defendant for damages, and had judgment, from which this appeal is taken. The answer was a general denial.

To sustain the allegation of the incompetency of Dawson, and the knowledge of the company that he was incompetent, the plaintiff, against defendant's objection, testified that in August, 1875, some days after the accident, he saw Mr. Goodwin, the defendant's roadmaster when the accident occurred, whose duty it was to employ and discharge section foremen, and who continued as such, until after August, 1875, and that Goodwin, on that occasion, told plaintiff that Dawson was incompetent, and he wanted plaintiff to take his place as section foreman. The principal question in this case relates to the admissibility of this evidence.

In *Betham v. Benson*, Gow. 48, DALLAS, C. J., announced the doctrine in regard to the admissibility of declarations of an agent against the principal, as follows: "It is not true that where an agency is established, the declarations of the agent are admitted in evidence merely because they are his declarations; they are only evidence when they form part of the contract entered into by the agent on behalf of the principal, and in that single case they become admissible. The declarations of an agent, at a different time, have been decided not to be evidence; indeed the cases on the subject draw this distinction between the declarations of an agent accompanying the making of, and therefore forming a part of the contract, and those made either at a subsequent or antecedent period." This is now the well-established doctrine, and its application to other acts of an agent besides that of making contracts is equally well settled. "The declarations of an agent are received, not as admissions, but as a part of the *res gestæ*." *Haven v. Brown*, 7 Me. 425; *Rogers v. McCune*, 19 Mo. 557; *Va. & Tenn. R. R. Co. v. Sayers*, 26 Gratt. 328; s. c., 15 Am. L. Reg. (N. S.) 297. Only declarations therefore made by the agent while transacting business within the scope of his agency, and then only because a part of the *res gestæ*, are admissible.

The doctrine is very clearly stated in the last above cited case, as follows: "It is true that where the acts of the agent will bind the principal, there his declarations, representations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ*. They are of the nature of original evidence and not of hearsay, the representation or

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statement in such cases being the ultimate fact to be proved and not an admission of some other fact. The party's own admission, whenever made, may be given in evidence against him ; but the admission or declaration of his agent binds him only when it is made during the continuance of his agency in regard to a transaction then depending *et dum fervet opus*. It is because it is a verbal act and a part of the *res gestæ* that it is admissible at all. It is to be observed that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal, and the declarations of the agent to be admissible must be part of the *res gestæ*." Greenleaf Ev. (Redfield's ed.) §§ 113, 114; Story on Agency, §§ 134, 137; *Griffin v. Mont. R. R. Co.*, 26 Ga. 111; *Robinson v. R. R. Co.*, 7 Gray, 92; *Moore v. Meacham*, 10 N. Y. 207.

These well-established principles usually constitute an unerring guide in determining whether or not declarations of an agent are admissible in evidence against his principal ; but the case at bar presents a peculiar phase distinguishing it from the great mass of adjudicated cases on the subject, and as the precise question has not often been passed upon, it remains to be considered whether the principles above announced determine it. The declaration of the roadmaster was not made at the time of the disaster to the plaintiff, and had no connection whatever with it in the chain of causation. The question was, whether the company had knowledge of the incompetency of Dawson ; and while knowledge on that subject possessed by Goodwin, the roadmaster, was knowledge of the company, the fact that Goodwin had such knowledge must be proved against the defendant, as any other fact, by the testimony of witnesses and not by the declaration of third parties ; and so far as proof of that fact is concerned, his declarations, except as a part of the *res gestæ*, stand upon the same footing as declarations made by other persons. The ultimate fact to be proved was that the company had knowledge of Dawson's incapacity at the time the accident occurred. If Goodwin, under the same circumstances and at the same time, had declared that the company had that knowledge, no one would contend for the admissibility of that declaration, yet it is urged that a declaration by him of a fact which the law declares to be the ultimate fact, the knowledge of the company, is competent evidence. He might be introduced as a witness to testify of his knowledge, or others might be called to prove that he

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was told before plaintiff was injured of Dawson's incapacity or that he was cognizant of acts of Dawson showing that incompetency, but his declaration that he knew it is but hearsay as against the company, no more admissible because he was still in the employment of the company, than if that employment had ceased when the declaration was made. If admissible on the ground that the best evidence that one knows a fact is his own statement on the subject, the reason would equally apply to a statement made after as before the employment ceases, and admit such evidence in a suit between A. and B. in which it becomes material to show that C. had knowledge of a given fact. Would evidence of C.'s declaration that he did or did not know it be admissible? We apprehend not. If admissible, C. might be in the court room, under no disability as a witness, and the party could, without calling him, prove his declaration against his adversary.

The case at bar is distinguishable from *Morse v. Conn. R. R. Co.*, 6 Gray, 450, and the other cases of that class cited by respondent's counsel, in that in those cases the declarations of the agents were made in relation to specific transactions within the scope of their agency not yet completed.

Without attempting by further argument to show that the case falls within, and is governed by the principles above announced, we shall merely refer to adjudged cases in which it has been so held. *Rogers v. McCune*, 19 Mo. 558, was an action by the owner of the steamboat Archer against McCune, a part owner of the steamer Die Vernon, for damages for the sinking of the Archer by a collision with the Die Vernon. On the trial evidence was offered of a statement made by the captain of the Archer, immediately after the collision, that it was entirely owing to the foul condition of the Archer's bell. The evidence was excluded, and Judge SCOTT, delivering the opinion of the court, said on that subject: "There was no error in excluding the declarations of the captain of the Archer as to the cause of the collision. He was no party to the suit, nor owner of the boat. His declarations could not be regarded as a part of the *res gestæ*. They were not made until after the transaction was past. The admission or declaration of his agent binds the principal only when it is made during the continuance of the agency, in regard to a transaction then pending. It is admissible because it is a verbal act and part of the *res gestæ*. What the captain said after the collision had taken place was a recital of the cause of it,

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and was no part of the transaction whilst it was passing." *Verry v. B. C. R. & M. A. Co.*, 47 Iowa, 549, is directly in point. The question was, whether the company had knowledge that a certain car was out of repair, and to prove it, the declaration of Sherman, one of the assistants of the foreman of the repair department, made ten minutes after the plaintiff was injured in consequence of the bad condition of the car, "that he knew that the car was in bad order," was admitted by the trial court, and the Supreme Court held it error, at the same time holding that Sherman was "such an agent of the defendant, that his declarations, in the line of his duty and in relation to matters under his supervision, if made at the proper time, would be admissible as evidence against the defendant." To the same effect are *Va. & Tenn. R. R. Co. v. Sayers*, *supra*, and *Huntingdon, etc., R. R. Co. v. Decker*, 82 Penn. St. 123. In this latter case, the declaration offered was made by the superintendent of the road who had the entire control and management of the road, its hands, machinery, etc., and had employed the conductor of the local freight through whose negligence, it was alleged, plaintiff's husband was killed. The declaration was made the day after the accident, and was to the effect that Bowser, the freight conductor, had disobeyed orders, and it was held inadmissible.

Chapman v. Erie R. R. Co., 55 N. Y. 583, unless very carefully read, might be cited to support the contrary view, but on a critical examination will be found in harmony with the Iowa and Pennsylvania cases on the question under consideration. The question was whether Fisk, the defendant's general superintendent, knew that Allison, a conductor, was in the habit of drinking. Evidence was introduced of his habits, and of facts tending to show that Fisk was aware of his habits before the accident, and a witness was permitted to testify that on one occasion, prior to the accident, he had a conversation with Fisk in reference to Allison's drinking, and that Fisk said, "Allison will have to quit this," meaning his drinking. CHURCH, C. J., delivering the opinion of the court, observed: "It is objected that the declaration of Fisk, above referred to, was inadmissible, and its admission is claimed to be error. As evidence of the fact of the habit of drinking, it was not admissible within the general rule, that the declaration of an agent will not bind the principal unless made at the time of doing some act within the scope of his agency, and which in fact constitutes a part of the act itself. But we think this evidence was competent

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to prove notice to Fisk. Other evidence was produced that Allison was in the habit of drinking to excess, and the remark, if it had reference to such habit, was pertinent to establish that he knew it. It would be competent to prove that a third person told him of it; and it is more satisfactory to establish the fact, that he admitted such knowledge at the time. It is evidence of a material fact. An admission afterward that he had known the fact would stand upon a different footing." Without approving the doctrine announced by the court on the precise question before it, the last sentence, as regards the question we are considering, recognizes the true doctrine as we understand it.

It will be observed that in most of the cases cited as sustaining the views advanced in this opinion, the agent whose declarations were offered was a vice-principal and *alter ego*, and yet no case has been found which holds such a one for all purposes to represent the principal in such a sense as to admit, as evidence against the principal, every statement or declaration made by him, with respect to the principal's business.

The conclusion we have reached is, that the court erred in admitting the evidence complained of, and the judgment, for this reason, must be and is reversed, and the cause remanded; and as there will probably be another trial of the cause, we will add that the incompetency of Dawson must be shown, and that the injury to plaintiff was occasioned by that incompetency, or other cause specifically alleged in the petition, and not by some other cause; and proof of Dawson's incompetency, and that such incompetency occasioned the injury, must be supplemented with proof that the defendant had knowledge of his incompetency before the accident occurred, and for this purpose, proof that Goodwin had such knowledge is sufficient. All concur.

STATE v. MUMFORD.

(73 Mo. 647.)

Criminal law — lottery.

Proprietors of a newspaper offered as an inducement to subscription, and gratuitously gave to every new subscriber, a ticket, entitling him to participate in a distribution of prizes, and the distribution was made by lot. *Held*, a lottery.*

CONVICTION of conducting a lottery. The opinion states the case.

C. J. Bower, for appellant.

D. H. McIntyre, attorney-general, for State.

NORTON, J. This cause is here on appeal from the judgment of the Criminal Court of Jackson county imposing a fine of \$25 on defendant. The indictment charges the defendant with unlawfully advertising and causing to be advertised in a certain newspaper published in the city of Kansas, in the county and State aforesaid, known as the Kansas City Times, the drawing of a scheme in a lottery, in and by which a certain piano and divers other pieces of property were to be disposed of by lot or chance, on the 16th day of June, 1877; and the indictment is founded upon section 28, page 503, Wagner's Statutes, which reads as follows: "Any person who shall sell or expose to sale, or shall keep on hand for the purpose of sale, or shall advertise or cause to be advertised for sale, or shall aid or assist, or be in anywise concerned in the sale or exposure to sale of any lottery ticket or tickets, or any share or part of any lottery ticket in any lottery or device in the nature of a lottery, within this State or elsewhere, and any person who shall advertise or cause to be advertised the drawing of any scheme in any lottery, and shall be convicted thereof in any court of competent jurisdiction, shall, for each and every such offense, forfeit and pay a sum not exceeding \$1,000."

The cause was submitted on an agreed statement of facts, which are substantially as follows: Defendant, as business manager of the Kansas City Times Company, in 1877, caused certain advertisements to be published in the Kansas City Times, a newspaper

* See *Wilkinson v. Gill* (74 N. Y. 63), 30 Am Rep. 264.

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owned and controlled by said company. The general purport of said advertisements was to the effect that four distributions of premiums would be made to the subscribers of said newspaper during the year 1877, amounting to \$20,000 personal property, consisting of pianos, books, guns, sewing machines, and many other useful articles, with the value placed opposite each, and that to each subscriber a ticket or tickets would be given (in accordance with the time of his subscription), which was good for all the distributions, provided he had not previously had a prize awarded. The allotments of prizes were superintended by a committee selected by the subscribers themselves at each stated distribution, and the committee allotted the gifts to the different subscribers by drawing tags from a large wheel, and then drawing a tag from a small wheel to correspond with one drawn from the large wheel, one representing the number of ticket, the other the number of prize. The whole proceeding of distribution was done without any authority, assistance, suggestion or advice of defendant, except that the Times Company furnished the paraphernalia for distribution, that is, the wheels, etc. All the subscribers who were ticket holders in these distributions paid no more for the subscription than the regular rates. The tickets were no enhancement of the subscription rates. Each ticket holder was entitled, when the ticket was properly registered upon the books of the Times Company, to a copy of the Times for the period paid for, and entitled to the four distributions, as stated before. In no instance did the defendant sell any ticket or tickets, nor did he demand a higher price for the newspaper with said tickets than without them; and at the request of the board of directors of the Kansas City Times Company a distribution of premiums was had on the 2d day of April, 1877, in the county of Jackson, and State of Missouri, on which date the ticket holders assembled in Kansas City, and through their committee, as before stated, made the allotments of gifts to the various subscribers, which premiums so allotted were delivered by defendant, as business manager of the Kansas City Times Company, and at the instance of the board of directors thereof.

Upon this statement the court held the defendant guilty; and the only question is, whether the facts agreed upon warranted the judgment rendered. It is insisted by defendant that they did not, mainly upon the ground that the scheme for drawing and distributing prizes was not a lottery, that the Kansas City Times was in-

trinsically worth the subscription price, and that such price was not increased by reason of the scheme. The term lottery has no technical meaning in the law, distinct from its popular signification, and it is defined by various lexicographers, as follows: "A distribution of prizes and blanks by chance — a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles." Worcester Dict. "A scheme for the distribution of prizes by chance." Bouvier's Dict. "A distribution of prizes by lot or chance." Webster's Dict. "A kind of game of hazard, wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate." Rees' Cyclopaedia. "A sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks." American Cyclopaedia. It therefore appears from all these authorities, that when there is a distribution of prizes of some value, by chance or lot, this constitutes a lottery. Testing the scheme, which the agreed statement of facts discloses in this case, by the above definition of the word lottery, it is clearly embraced by it. The subscription price of the Kansas City Times, when paid by the subscriber, entitled him to a copy of the paper and also to a ticket which might draw a prize (as for instance, a piano), worth a hundred fold more than the subscription price of the paper. The drawing of such a prize under the scheme was within the range of probabilities, and doubtless many subscriptions for the paper were made and induced solely by the consideration that the person subscribing would be entitled to a ticket which might bring to him some one of the many valuable prizes to be disposed of in the drawing. The fact that the subscription price of the Times was not increased does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a ticket in the lottery as well as to a copy of the paper. The facts agreed upon, we think, bring the case clearly within the statute upon which the indictment is framed, and make the defendant amenable to the penalty therein prescribed. Similar schemes have been condemned by the courts of other States, as being obnoxious to and violative of statutes similar to our statute, as will be seen by reference to the following authorities: *United States v. Olney*, 1 Abb. (U. S.) 275; *State v. Clark*, 33 N. H. 335; 59 Ill. 160; 40 id. 465; 42 Tex. 580; 2 Whart., § 1491. Judgment affirmed, in which all concur.

Judgment affirmed.

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ALEXANDRIA, WARSAW & KEOKUK FERRY COMPANY v. WISCH.

(78 Mo. 655.)

Ferry — exclusive — owner of goods transporting them.

One may lawfully transport his own goods habitually in his own boat where another has an exclusive right of ferry.

ACTION for a penalty. The opinion states the case. The defendant had judgment below.

N. T. Cherry and J. W. Reed, for appellant.

Ben. E. Turner, for respondent.

NORTON, J. This was an action before a justice of the peace to recover a penalty for an infringement of plaintiff's ferry franchise, under section 5 of plaintiff's charter. The plaintiff had judgment before the justice for \$50, from which an appeal was taken to the Clark county Circuit Court, where, upon trial, judgment was rendered for defendant, from which plaintiff has appealed. The cause was submitted in the Circuit Court on the following agreed statement of facts, viz.: That plaintiff is incorporated by virtue of an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Alexandria, Warsaw & Keokuk Ferry Company," approved February 20, 1865 (Sess. Acts 1865, pp. 186, 187), and amended act approved March 19, 1866 (Sess. Acts 1866, 213); that plaintiff organized under said charter, and placed a steam ferry boat in the Mississippi river, running it between the city of Alexandria, in Clark county, Missouri, and the city of Warsaw, Illinois, at a large outlay and expense to plaintiff, for the purpose of transferring freight, passengers, teams and stock, and to do the legitimate business of a ferry between the above-named points; that defendants built a large flat boat (twenty-five feet long, seven feet four inches wide and two feet deep) for the express purpose of transferring their own property across the Mississippi river, costing \$1,800; that defendants each own and run a large cooper shop in Warsaw, Illinois, and purchase a part of their stock in Missouri; that defendants did, on the — day of July, 1877, land their flat boat within 100 yards of the center of the levee at Alexandria, Missouri, and near the landing of the ferry, and took from said levee a quantity of freight, hoop-poles and

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staves, their own property, purchased by them prior thereto, and took said freight across the Mississippi river, the same all being exclusively for their cooper shops; that defendants ran their said flat boat regularly at all times to suit their own convenience, whenever they had material of their own to transfer from the Alexandria levee to their shops at Warsaw, Illinois; that defendants hired not exceeding two hands to take their own boat and row it over the Mississippi river and load it, from the said Alexandria levee, within one and a half miles from the center thereof, with hoop-poles belonging to defendants, and carry the same across the river at a certain fixed price per hundred; that plaintiff was running its ferry regularly at the time of the alleged infringement by defendants, and are at this time running its said ferry; that defendants had notice of the provision of plaintiff's charter and amended charter; that plaintiff had no license from the County Court of Clark county.

The only question in the case is, whether the above statement justified the court in rendering judgment for defendant. The 5th section of plaintiff's charter (Acts 1865, p. 187), which it is claimed confers the right of action in this case on plaintiff, provides that the Alexandria, Warsaw & Keokuk Ferry Company shall have the exclusive ferry privilege from the said city of Alexandria, in Missouri, to the city of Warsaw, in Illinois * * * for the distance of one and a half miles above and one and a half miles below the present levee of said city of Alexandria on the river, and should any other person or persons keep or run a ferry, and land within said three miles, such person or persons shall forfeit and pay to the ferry company hereby created \$50 for every such landing made, to be sued for and recovered before a justice of the peace of the county of Clark. Before the right of plaintiff to recover the penalty prescribed in the above section is established, it must be made to appear that the person or persons sought to be charged with it kept or ran a ferry and landed boats within the territory in which plaintiff had the exclusive right or privilege. That the facts agreed upon do not bring the plaintiff's case within the provisions of the section of its charter above quoted, we think clear. The legislature in using the word "ferry" must be understood to have used it in its legal sense. A ferry is defined in Bouvier's Law Dictionary to be "a place where persons are taken across a river or other stream in boats or other vessels for hire." It is defined in Wait's Actions and Defenses, vol. 3, p. 345, to be the "liberty to

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have a boat for passage upon a river, for the transportation of men, horses, carriages and contents for a reasonable toll." The facts agreed upon do not show that defendants kept or ran a ferry as thus defined, but on the contrary, that they simply used a flat boat in transporting across the Mississippi river their own property ; and this, according to the following authorities, they had a right to do : " Any person has a right to transport himself and his property over a river in his own boat, even though there may be a ferry at the place where he crosses." 3 Wait's Act. and Def. 348. But if he makes this right a cloak or cover for carrying travellers or property of others, then it becomes an infringement of the ferry right. *Weld v. Chapman*, 2 Iowa, 524. Judgment affirmed. All concur.

Judgment affirmed.

 SKILLING V. BOLLMAN.

(73 Mo. 665.)

Bill of lading — delivery for pre existing debt.

The indorsement of a bill of lading and the delivery of the goods in consideration of a pre-existing debt is valid as against a subsequent innocent purchaser of the goods, whether such transfer was in payment or as collateral security.

ACTION for value of goods. The opinion states the case. The plaintiff had judgment below.

Noble & Carrick, for appellants.

Finkelburgh & Rassiem and *Garland Pollard*, for respondents.

HENRY, J. This suit was instituted in the Circuit Court of St. Louis county by plaintiffs, to recover of defendants the value of 150 barrels of high wines, and the following are the facts on which the controversy arose : Skilling, Carter & Ahrenz were bankers at Beardstown, Illinois, and the Beardstown Distillery Company was a corporation doing business at the same place. In 1874, and subsequent years, said bankers had loaned large sums of money to the distilling company, amounting in February, 1876, to about \$20,000. On the 25th of that month, the distilling company shipped to St.

Louis, by steamboat, 200 barrels of high wines, and triplicate bills of lading were executed by the boat to the order of the distilling company, of which two were delivered to Blumb, its secretary, one of which he placed and locked in his desk, but Sheber, the vice-president and general manager of the company, also had a key to the desk, and furtively took the bill of lading, and under the false pretense of going elsewhere, took passage on the boat and accompanied the high wines to St. Louis, where he sold and delivered 150 barrels to the defendants. The boat arrived at St. Louis on the 26th of February, and between nine and ten o'clock A. M. of that day, Sheber sold and delivered 100 barrels, and subsequently 50 barrels to the defendants. On the same day, and about the same hour, Blumb indorsed the bill of lading in his possession, ordering the delivery of the wines to Gregory & Stagg, of St. Louis, and drew two drafts on them, against the wines, for \$7,000 each, payable to plaintiffs, to whom, at the same time, the bill of lading and drafts were delivered. Gregory & Stagg refused to accept the drafts, and plaintiffs, who on receiving them had credited the amount on the distilling company's account, re-charged it against said company.

The evidence proved that Sheber was vice-president and general manager of the business of the distilling company, and as such authorized to sell the wines; and that by the by-laws of the corporation, Blumb had no authority to draw checks, or notes, or drafts, or indorse bills of lading, for the corporation, but there was evidence that he did so, in all transactions with the plaintiffs, with the knowledge and acquiescence of the corporation, and the question of his authority to draw the drafts, and to indorse and dispose of the bill of lading in question, was properly submitted to the jury.

That the bill of lading was delivered to the plaintiffs as collateral security for pre-existing indebtedness cannot be controverted, and we are of opinion that the controlling question for determination by the jury, on the evidence as presented in the bill of exceptions, is whether the delivery of the bill of lading to plaintiffs, or the sale to defendants, was prior in point of time. "Bills of lading, by the law merchant, are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods; divests the vendor's lien."

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Benjamin on Sales, § 813. In *Meyerstein v. Barber*, L. R., 2 C. P. 42, ERLE, C. J., said: "While the goods are afloat, it is common knowledge, and I should not think of citing authorities to prove it, that the bill of lading represents them, and the indorsement and delivery of the bill of lading, while the ship is at sea, operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." In *M. C. R. R. Co. v. Phillips*, 60 Ill. 198, the court said: "The bill of lading was the documentary evidence of the shipper's property in the hands of the carrier; it represented the property and the delivery of the bill of lading to the bank was a symbolical delivery of the high wines, so as to vest the property in the bank. It was as effective in transferring the possession, as the delivery of the keys of a warehouse is of the goods contained in it, or a storekeeper's receipt of the goods described in it, or a warehouseman's receipt of the property it embraces." To the same effect are *Burton v. Curyea*, 40 Ill. 320, and *W. U. R. R. Co. v. Wagner*, 65 id. 198; and numerous other authorities might be cited in support of the proposition, but we forbear incumbering this opinion with references to sustain a doctrine nowhere controverted.

If therefore the delivery of a bill of lading to plaintiffs occurred before the sale to the defendants it makes no difference that it was for a pre-existing debt, or whether it was an absolute sale of the goods or intended as a collateral security for the debt. On the other hand if the defendant's purchase was prior to the delivery of the bill of lading to the plaintiffs their title is superior to that of the plaintiffs. "When several bills of lading have been signed, the person who first gets one of them by a legal title from the owner or shipper has a right to the consignment." *Caldwell v. Ball*, 1 T. R. 205. Inserting in the bill of lading the name of a consignee gives him no property in the goods until a delivery of the bill to him by some one authorized. *Allen v. Williams*, 12 Pick. 297; *Buffington v. Curtis*, 15 Mass. 528; 8 Am. Dec. 115. In the present instance the property by the bill of lading was deliverable to the order of the shipper, and therefore no question can arise as to the ownership of the high wines by the distilling company at the time of the sale at St. Louis if prior to the delivery of the bill of lading to plaintiffs, or at the time the latter occurred if prior to the sale at St. Louis.

Conceding that Blumb represented the company, and had a bill of lading which was documentary evidence of the company's property

in the goods, and the delivery of the same to plaintiffs was sufficient to pass the title to the high wines *in transitu* as against the company and subsequent purchasers, it could not have that effect against a prior purchaser of the goods who either claims under an assignment and delivery of one of the triplicate bills of lading, or under a purchase and actual delivery of the goods by the shipper and owner. The delivery of a bill of lading passes title to the property only because it represents it, and the sale and delivery of the property itself, by the person authorized to sell it, is at least equally as effectual to pass the title as the delivery of one of the bills of lading. As the bill of lading represents the property, and its delivery to an assignee has the same effect as the actual delivery of the property, and as a mortgage or pledge for a pre-existing debt is valid against subsequent purchasers, there is no ground for holding if the bill of lading was delivered to plaintiffs before the sale at St. Louis, that their title is not superior to that of defendants. Unquestionably an actual delivery of the goods in pledge for a prior indebtedness would vest a title in the pledgee which could not be successfully assailed by a subsequent purchaser. Hence whether plaintiffs received the bill of lading as collateral for a pre-existing debt or for an advancement then made is a matter of no consequence in this case.

Eminent jurists and judicial tribunals hold that one who for prior indebtedness receives a bill of lading of goods, either as collateral security or in payment of such indebtedness, has no such title as will avail even against the vendor's right of stoppage *in transitu*; in other words, that such an one, in such a controversy, is not to be regarded as a *bona fide* purchaser for value. *Loeb v. Peters*, 63 Ala. 243; s. c., 35 Am. Rep. 17; *Harris v. Pratt*, 17 N. Y. 249; *Lesassier v. Southwestern*, 2 Woods, 35; *O'Brien v. Norris*, 16 Md. 122; *Naylor v. Dennie*, 8 Pick. 199; 19 Am. Dec. 319. And *Goodman v. Simonds*, 19 Mo. 106, and *Logan v. Smith*, 62 id. 455, recognize the principle announced in the foregoing cases. There is here however no question which makes a resort to the doctrines on that subject necessary to the determination of this cause.

If it should be found that Blumb had authority to draw the drafts and transfer the bill of lading in question, then the right to the property depends upon the priority of the transaction under which the parties respectively claim. Without inserting the instructions given by the Circuit Court to the jury, it is sufficient to say that

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they are not in harmony with the doctrines herein announced, and therefore the judgment of the Court of Appeals, reversing the judgment of the Circuit Court and remanding the cause, is affirmed.

Judgment accordingly.

MATHENY V. MASON.

(73 Mo. 677.)

Sale — implied warranty of title — accounting to true owner.

In an action for the price of personal property, it is a valid defense that the purchaser discovered after the sale that the vendor had no title, and being threatened with suit by the true owner, paid him the price, the vendor being insolvent.

ACTION for price of goods sold. The opinion states the case. The plaintiff had judgment below.

Gates & Wallace, for appellant.

Robert Adams, Jr., for respondent.

RAY, J. The petition alleges that plaintiff sold and delivered to defendant 1,123 bushels and thirty pounds of corn, at sixty cents per bushel; that defendant paid plaintiff thereon the sum of \$10, leaving a balance of \$664.10 due and unpaid, for which judgment is asked. The material part of the answer admits the purchase of the corn, at the price stated; the payment of the \$10; but avers as a defense to the action, that upon the sale of said corn, the law implied a warranty of title, on the part of the plaintiff to the defendant, for said corn, and then charges that said corn, in fact, did not belong to the plaintiff, but was the property of Amos and Nathan Bailey; that at the time of the purchase he supposed the plaintiff was the owner of the corn, and did not learn that it belonged to the Baileys until after the sale and delivery thereof to the defendant; that the Baileys, after the sale and delivery, gave notice to the defendant that the same belonged to them, and demanded that payment therefor should be made to them, and were threatening to sue defendant therefor; and the defendant thereupon, learning that the Baileys were the true owners of the corn,

and that it did not belong to the plaintiff, paid the said Baileys the full value thereof, before the commencement of this suit ; and the answer further charges that the plaintiff, at the time of said sale, was, and ever since has been, and still is insolvent. To this answer the plaintiff demurred, because it did not state facts sufficient to constitute a defense herein, and was insufficient in law ; which demurrer the court sustained, and the defendant electing to abide by said answer, and declining to answer further, final judgment was given for the plaintiff, for the balance claimed in the petition. Whereupon the defendant filed his affidavit and bond, and brings the case here by appeal.

The only question in the case is the sufficiency of this answer. The court below, by sustaining the demurrer, held it insufficient. It must be confessed that there is great conflict of authority on this point. Many decisions have been made, in the courts of the different States, upon questions similar to that presented by this demurrer, and these decisions are by no means in harmony with each other ; nor is it an easy matter to determine how the weight of authority is upon the precise point presented by this answer and the demurrer thereto.

It will be observed that this is a case between the seller and purchaser of personal property ; where the vendee, when sued for the purchase-price, sets up by way of defense, that the seller had no title to the property sold, and was and is totally insolvent and unable to respond to a breach of warranty of title to said property if sued therefor ; and that said purchaser, upon notice and claim of the true owner thereof, and his threat to sue therefor, has paid said claimant and owner the full value of said property. Numerous cases are cited by the briefs of counsel on each side. Some of them are cases like this ; but many of them are cases between vendors and vendees of real estate, some of them between bankers and their depositors, and others between bailors and bailees, or common carriers and their employers or shippers. In all these cases the point in dispute was the want of title in the vendor, depositor, bailor, consignor or other claimant ; but whether the like or a different rule is applicable to all these classes of cases, it is perhaps not necessary here to inquire or determine.

In this State the principle is well settled, that the purchaser of land, who has taken a conveyance with covenants of title, or a bond for such a conveyance, and is placed and continues in the undisturbed

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and undisputed possession thereof, will not be relieved against the payment of the purchase-money on the mere ground of defect of title, there being no fraud or false representation as to the title and no eviction. In all such cases, he cannot resist the payment of the purchase-money without offering to restore the possession thus acquired by him to the vendor. *Mitchell v. McMullen*, 59 Mo. 252; *Harvey v. Morris*, 63 id. 475; *Wheeler v. Standley*, 50 id. 509; *Conner v. Eddy*, 25 id. 72; *Smith v. Busby*, 15 id. 343. In all these cases however it is to be remarked that the parties attempting to set up this defense were in the undisturbed and undisputed possession of the real estate so bought, and that no person was disputing their title except themselves, and that for the purpose of getting rid of the payment of the purchase-money. What difference, if any, would have been made in such cases, if the true owner of the title to such property had been asserting his title and claiming the possession thereof, and said purchaser had yielded to his claim by purchasing his title, need not here be inquired or determined. No case in our court of the latter sort has been called to our attention in the brief of either counsel.

It is equally well settled in this State, that a purchaser who has paid for land, may, where the paramount title is outstanding, maintain an action against his vendor for a breach of his covenant of warranty without an actual eviction. "That is, an actual dispossession, by process of law, consequent upon a judgment, is not necessary, in order that a covenantee may maintain an action for breach of the covenant of warrant." "In all such cases however of voluntary dispossession or ouster *in pais*, where there has been no judgment, the burden of proof is upon the covenantee to establish the adverse paramount title to which he has yielded; and the possession should only be surrendered after claim or demand made therefor." *Morgan v. Hannibal & St. Joseph R. R. Co.*, 63 Mo. 129, and cases cited. Whether such a party, in such case, who had given his note for the purchase-money of such land, could in like manner successfully resist the payment of said note by assuming the like burden, when he has yielded to such adverse title without suit, by purchasing in the same, it may not be necessary here to consider or pass upon. Such also seems to be the law in other States, in like controversies between vendees and vendors of real estate. See 21 Wend. 131; 8 Barb. 1; 6 Gray, 572; 4 Hill, 643; 6 Barb. 165; 4 Mass. 349. It may be remarked however that the implied war-

ranty of title, upon the sale of personal property, has been held by the authorities to be analogous to a covenant for quiet enjoyment in the sale of lands; and it would seem, from these authorities, that the courts do not maintain a different rule in actions based on a breach of warranty of title on the sale of personal property from that adopted in a like action in the sale of real estate. See 62 N. Y. 331; 1 Lans. 145; 26 N. Y. 230; 40 id. 285, 286.

In the case at bar the contest is between the seller and purchaser of personal property. The demurrer admits all the allegations of the answer to be true, and the judgment of the court sustaining the demurrer declares that they constitute no defense to this action. In support of this ruling of the court the respondent cites and relies on a number of authorities to the effect, that "in such case it is not competent to the vendee to dispute the title of his vendor, unless he has been charged at the suit of another person who has, after contestation, shown a better title; that he cannot in this way draw the plaintiff's title in question by his own voluntary act of payment." Such is the language of *Vibbard v. Johnson*, 19 Johns. 78. In this case however the purchaser knew at the time of his purchase that another party claimed the goods, to whom he afterward voluntarily paid the price without suit. To the same effect is the case of *Morrison v. Edgar*, 16 Mo. 411, 414. In this latter case however "it was admitted that the purchaser had remained and was in the undisturbed and undisputed possession of the property under the sale." It did not appear that the real owner had in any way asserted his title or made any claim or demand for the property so bought and held. The case of *Case v. Hall*, 24 Wend. 102, 104, also recognizes the same doctrine. But among the reasons assigned by the court for such rulings it was remarked, "that the indemnity is complete by responding therefor, after a recovery under a paramount title." In the case at bar it stands admitted that the seller is wholly insolvent and unable to respond for a breach of his warranty of title, if sued therefor.

The case of the *Delaware Bank v. Jarvis*, 20 N. Y. 230, seems to recognize the doctrine of the demurrer. The case of *Lund v. Seamen's Bank*, 37 Barb. 132, states the same doctrine quite broadly. It asserts that "no principle of law can however be found which permits a debtor for goods sold, or for money lent or deposited, to set up as a defense against the claim of his creditor that his title to the goods sold, or money lent or deposited, is defective or wrong-

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ful. That question is of no concern to the purchaser or borrower, unless the third party who claims to have been despoiled of his goods or money will proceed by process of law to enforce his right. It can never be permitted that a debtor may volunteer, by plea or answer, the protection of the claims of those with whom he has had no dealings to defeat his liability for the performance of his contract." This case, however, was that of a banker attempting to resist the claim of his depositor for funds received from him and placed to his credit on the books of the bank, on the ground that some third party claimed the funds so deposited. This doctrine is also asserted by Bigelow on Estoppel, 387, in the identical language of 37 Barb., *supra*.

On the contrary it is insisted on the part of the appellant that in such case as the one at bar it is perfectly competent to the vendee to dispute the title of his vendor, without waiting to be charged at the suit of another person by due process of law; that the purchaser, if satisfied that the claimant of the property is the true owner, and can and will in an action against him recover the property from him, or its value, is not bound to resist the claim of such owner, but may abandon the property to such owner or pay him the value thereof without action; taking upon himself the *onus* of showing, if sued for the price by his vendor, that he had no title to the property or right to dispose of it; and that the party to whom he has surrendered the property upon claim, or to whom he has paid the purchase-price, had the title and was the true owner thereof. In support of this proposition numerous authorities are cited and relied on where this doctrine is expressly recognized and sanctioned. Among them are the following: *Sweetman v. Prince*, 26 N. Y. 232; *Bell's Cont. of Sale*, 94, 95; *Burt v. Dewey*, 40 N. Y. 286; *McGiffin v. Baird*, 62 id. 329, 331; *Bordewell v. Colie*, 1 Lans. 141, 143, 144; *Dickenson v. Maul*, 4 B. & Ad. 638; *Allen v. Hopkins*, 13 M. & W. 93; *King v. Richards*, 6 Whart. 418, 427; *Hayden v. Davis*, 9 Cal. 573; *Frazier v. Erie Bank*, 8 W. & S. 18, 20, and *Arnold v. Macungie Bank*, 71 Penn. St. 287. These authorities, we think, seem fully to warrant the sufficiency of the answer set up in this case.

If it be true as charged in this answer (and the demurrer admits its truth), that the plaintiff was not the owner of the corn in question, and was wholly insolvent; and that the Baileys were the actual owners of said corn, and notified the defendant of their claim,

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and demanded payment therefor, and threatened to sue if their demand was not complied with; and that the defendant thereupon paid the true owners and claimants the full value of said corn, what wrong or injustice has been done? In such a case has the plaintiff any standing in court? It will not do to say that it was the duty of the defendant to return the corn to his vendor. That would not have relieved him from his liability to the true owner for a conversion of the property after demand and refusal. That he would have been so liable there can be no question. *Bordewell v. Colle*, 1 Lans. 144. In a case like this, would it be equitable, just or proper, to require the defendant to pay the purchase-price to the plaintiff, and when compelled by the true owner to pay the same a second time, to take the chance of recovering it back again, from his vendor, on his breach of warranty, when that vendor is admitted by the demurrer to be utterly insolvent? By this answer the defendant assumed the burden of proving its truth. He acts at his peril. The risk is his. If he succeeds justice is satisfied. If he fails, the fault or misfortune is his, and he must take the consequences. Notwithstanding the conflict of authority on this point, as manifested by the above decisions and others not mentioned, we are satisfied, after a careful examination, that the weight of authority, as well as the equity and justice of the rule, on principle, is in favor of the sufficiency of this answer. It was error therefore to sustain the demurrer, and for this reason the judgment is reversed and the cause remanded. All concur.

Judgment reversed.

CASES

IN THE

SUPREME COURT

AND IN THE

COURT OF ERRORS AND APPEALS

OF

NEW JERSEY

STATE V. ADDY.

(14 Vroom, 113.)

Criminal law — suspension of sentence.

On conviction of maintaining a nuisance the court suspended sentence, on payment of costs, so long as the defendant should abate the nuisance. At a subsequent term the court imposed sentence of imprisonment and payment of costs. Held, void. (See note, p. 551.)

CONVICTION of maintaining a nuisance. The opinion states the case.

DIXON, J. The petitioner was, at the September Term, 1877, of the Passaic Sessions, convicted upon an indictment for maintaining a nuisance by obstructing a culvert over a water-course so that a highway was overflowed. After the verdict, the minutes show the fol-

lowing action of the court: "The defendant being placed at the bar for sentence, the court do order and adjudge that sentence be suspended on payment of the costs of this prosecution, so long as the defendant shall keep the culvert complained of clear and unobstructed, and shall do whatever else may be necessary to abate the nuisance of which he stands convicted." Thereupon the defendant paid the costs, and under the direction of the sheriff abated the nuisance and was discharged.

On the 3d day of April, 1880, the court took the following action, as shown by the minutes: "The defendant being placed at the bar for sentence, the court do order and adjudge that he, the said defendant, be confined in the county jail for the term of thirty days, and pay the costs of this prosecution. This action seems to have been based upon the ground that the defendant did not keep the culvert clear.

Being imprisoned under this determination, the petitioner sued out a writ of *habeas corpus*, and he now insists that his imprisonment was illegal, the order therefor being void, because the power of the court over him was exhausted by the proceedings had in September, 1877.

Whether he is right in this position is the main question to be here decided.

The practice of suspending sentence in criminal cases has long been in vogue in this as well as other States. In *Commonwealth v. Dowdican's Bail*, 115 Mass. 133, Chief Justice GRAY speaks of it as common in Massachusetts, and as recognized by statute there, and says that an order to that effect is not equivalent to a final judgment, or to a *nolle prosequi*, or discontinuance, by which the case is put out of court, but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the docket, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment thereon. Upon the other hand, in *People v. Morrisette*, 20 How. Pr. 118, Justice BALCOM denied the power of the court to suspend sentence indefinitely in any case, unless an application for new trial, or motion in arrest of judgment, or other legal proceeding by way of review, were pending, and regarded its exercise in other cases, provided the defendant was discharged from imprisonment, as a *quasi* pardon, which could lawfully be granted only by that body in whom the pardoning power

State v. Addy.

was vested. But it is not a complete objection to a claim of authority on behalf of the courts, that its use is equivalent to a pardon. This is the effect of the acquittal of a confessedly guilty accomplice; and yet an order of the court directing such an acquittal upon a proper occasion, is easily defensible, on grounds of public policy. *State v. Graham*, 12 Vroom, 15; s. c., 32 Am. Rep. 174.

It would seem that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment upon a conviction of crime, unless some legal proceeding for review be interposed. Considerations of public policy may induce the court to stay its hand.

But this view does not meet the difficulties of the present controversy. Here the complaint is, not that the court suspended sentence, but that after seeming to do so, it proceeded to judgment. If the order of September, 1877, is to be regarded as a mere stay, and the before-mentioned opinion of Chief Justice GRAY is correct, the sentence passed in April, 1880, was legal. But this earlier order cannot in justice, I think, be so considered. It in effect required of the defendant that he should pay the costs of prosecution and abate the nuisance, as the condition of his escaping further punishment. Although it did not in terms command these things to be done, yet it presented to the defendant such an alternative in case of his non-compliance, that it was scarcely in human nature for him to refuse obedience. For the court had the right, not only to exact what this order impliedly enjoined, but to fine and imprison besides, and of course the defendant would yield to the lesser penalty rather than provoke a greater. Substantially then this was an order of the court that the defendant abate the nuisance and pay the costs. Now in what way could the court legally require the abatement of the nuisance? Only by its sentence upon the verdict. That the nuisance be abated is regularly a part of the judgment upon conviction. Bac. Abr., "Nuisances," D, "Highways," E; *Rex v. Pappineau*, Str. 686; *State v. M. & E. R. R. Co.*, 3 Zab. 360; *Att'y-Gen. v. N. J. R. R. & T. Co.*, 2 Green Ch. 136; *Freeholders of Bergen v. State*, 13 Vroom, 263.

And in *King v. Stead*, 8 T. R. 142, where the Sessions had issued a precept for abatement of the nuisance after conviction and before judgment, Lord KENYON declared the precept to be a novelty.

The present question therefore amounts to this; whether, when

the court has exacted of the defendant upon his conviction what it can legally require only by judgment, it can, at a subsequent term proceed to inflict the remainder of what it might have imposed by its sentence originally. Suppose the court had ordered that if the defendant would pay a fine of \$500, it would suspend sentence so long as he behaved himself; could the court, after the payment, pass sentence upon him, even to the full extent of the statutory penalty? or could it exercise any further power at all over the defendant? And yet its authority to fine is of the same character as that to abate the nuisance—one to be exercised by judgment only. Such a course seems to me not to differ in substance from the passing of two sentences at different terms upon one conviction of a single offense; and I think no case can be found warranting it. To show that a single sentence exhausts the power of the court to punish the offender, after the term is ended or the judgment has gone into operation, reference need only be made to the recent decisions in *Ex parte Lange*, 18 Wall. 163; *Commonwealth v. Foster*, 122 Mass. 317; s. c., 23 Am. Rep. 326; and the authorities there cited. In *State v. Gray*, 8 Vroom, 368, Justice VAN SYCKEL, in this court, speaking of an erroneous criminal sentence, said “the court which rendered the judgment cannot vacate it or render a new judgment after the term at which it was pronounced is ended or the judgment is executed and the punishment partly borne.” In *Commonwealth v. Mayloy*, 57 Penn. St. 291, the same principle was maintained, although concurrently with the first sentence a rule to reconsider was entered, and the second penalty was lighter than the first.

Nor does it obviate the objectionable features of this procedure to declare the first action unlawful and to uphold the subsequent formal and avowed sentence. In *Ex parte Lange*, and in *State v. Gray*, *ubi supra*, the first judgments were erroneous in substance, and yet it was considered that after they had been partly executed the court had no power to vacate them for the purpose of imposing the legal penalty. But here the substance of the order was warranted in law; if the court had formally adjudged that the defendant should abate the nuisance and pay the costs, it would have been unexceptionable. It should seem therefore *a fortiori*, that where the court has made an order tantamount to such legal judgment, and the defendant has complied with it, its mere informality ought not to justify the State in claiming a second sentence. The citizen

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cannot be so put twice in jeopardy. By submitting to the demands of the court he pays the penalty of his offense once for all, and the power of the State to punish him therefor is exhausted.

The conclusion therefore is that in September, 1877, the Sessions did substantially render judgment on the conviction, that its declaration that sentence was suspended was contrary to the fact, and reserved no power to the court for the further punishment of the offender, and hence that its action in April, 1880, was unwarranted and void, and did not legalize the defendant's imprisonment.

The petitioner consequently is entitled to be released on *habeas corpus*, and it is so ordered.

So ordered.

NOTE BY THE REPORTER. — In *Whiting v. State*, 6 Lea, 247, on conviction the entry was: "In this case it is considered by the court that the defendant should pay a fine of ten dollars and the costs of the case, but suspends judgment until the next term of the court." Held, that the court at the next term could not add imprisonment. The court said: "If it be true that judgment was rendered at the trial term, then it was beyond the power of the court to change that judgment at the next term, or even at the same term if the judgment be executed. *Lange, Ex parte*, 18 Wall. 163. On the other hand, if there was no judgment, the power of the court to render it at the subsequent term is equally certain. *Greenfield v. State*, 7 Baxt. 18. And the court may suspend the execution of its judgment in a proper case. *Allen v. State*, Mart. & Yerg. 294; *Fults v. State*, 2 Sneed, 232. The question therefore is, whether the language of the original entries amounts to a rendition of judgment. We are constrained to say that it does, and that only the execution of the judgment was suspended, although the intention of the trial court may have been otherwise."

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(14 Vroom, 128.)

Negotiable instrument — indorsement before utterance.

An accommodation indorsement of a note after delivery, but before the payee, imposes only the liability of second indorser, and does not authorize the holder to write over it a contract of guaranty.* (*See note, p. 557.*)

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below. Rule to show cause.

J. H. Stone and Leslie Lupton, for the rule.

J. N. Voorhees and John Schomp, contra.

KNAPP, J. The only question raised in this case requiring consideration is whether the defendant Potter is liable on the note

* *see Dubois v. Mason* (127 Mass. 37), 34 Am. Rep. 335.

upon which his name appears. It received his indorsement before that of the payee was put upon it; and as such an indorsement in itself indicates nothing of the character of the liability intended by the parties, resort must be had to extrinsic evidence to discover what were his relations to the transaction and with what purpose he put his name upon the paper. The circumstances may show a party to such irregular indorsement to be either a surety or joint-maker, or guarantor, or he may be held as a second indorser. *Chaddock v. Vanness*, 6 Vroom, 517; s. c., 10 Am. Rep. 256.

The declaration contains counts against him as joint-maker, guarantor and as an indorser, and his liability in one or the other of these aspects must appear to support the verdict against him. The note was drawn by Weldon, payable at six months, to the order of Farrand, and was delivered to the payee with no agreement or understanding between them or with Potter, that the latter was to be in any manner a party to the note, or that any security was to be furnished by Weldon on the note. Between Weldon and Farrand then a debt was thus created, the debtor, the sum of the indebtedness, and the time of credit ascertained and established by the delivery of an instrument perfect and complete in its terms. Some days after its delivery to the payee, Potter was requested by the maker to indorse the note; the note was produced by the payee and Potter wrote his name on the back of it. It is evident from this state of facts that he is not to be considered a joint maker, for in the creation of the original debt he did not participate, nor was he in any manner allied to the consideration on which the note was grounded. The note was not given or received upon any misunderstanding or expectation that his suretyship in any form, or that any additional security should be had upon the note to strengthen the maker's undertaking.

Neither property nor rights were parted with by the payee on the credit of Potter's name.

In order to charge him in that capacity his credit should have been so involved in the original transaction that the contract under which the payee parted with his property or rights was not, in the contemplation of the parties, complete without the name of Potter as surety. *Moies v. Bird*, 11 Mass. 436; 6 Am. Dec. 179; *Tenney v. Prince*, 4 Pick. 387; 16 Am. Dec. 347; *Mecorney v. Stanley*, 8 Cush. 85; *Chaddock v. Vanness*, *supra*.

When the note came to the plaintiffs with the indorsement of the

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payee and Potter the signature of the latter imported the contract of second indorser, and he might have been charged with that liability. But it is not contended that in this suit he can be held as indorser, for it appears that notice requisite to charge him in that capacity was not given.

Is he chargeable as a guarantor? When the note was produced at the trial that form of contract was found written over his signature; but it was not there when the indorsement was made, nor was it written there by his direction or with his knowledge. The plaintiffs insist that such was the character of the defendants' engagement, and signing the note in blank authorized them to write over the blank a guaranty.

It was said in *Chaddock v. Vanness*, that when a third party puts his name on the back of a promissory note as a surety or guarantor for its payment, in pursuance of an original agreement entered into before or at the time of giving the note, in consideration of which the payee agrees to accept it, the payee may write over such signature a guaranty or promise to pay, which shall be a sufficient memorandum within the statute of frauds.

But the case here is not analogous to those original undertakings of a third party in the creation of the debt, where although he may be called a guarantor, his liability in legal effect differs in nothing from that of a co-maker. In such cases the statute of frauds is inapplicable. In this case, where the contract creating the debt was fully consummated, the alleged promise of defendant to pay or further secure the debt was a collateral engagement, within the statute, required a writing to prove it and a new consideration to support it. Fell on Guar. and Sur. App. 483.

And where, as here, the alleged promise is clearly one to pay the debt of another, and therefore necessarily in writing, I do not see how a mere signature in blank can be considered such writing. It has in its relations to the original debt no such fixed significance that the law will from it imply a specific duty or liability; and is the holder to determine for himself, out of the variety of forms that such a contract is capable of, which one the persons signing shall assume? I think the blank indorsement gave no implied authority to write over it any form of guaranty. And such I understand to be the view expressed by Chief Justice HORNBLOWER in *Crozer v. Chambers*, Spenc. 256.

Treating the superscription however as properly made, it is clear

that on the evidence he cannot be held in that character. As has already been said, to support such promise there must have been a valid consideration. The defendant's engagement was entirely gratuitous. Not a feature of the original debt was changed in consequence of it; the payee yielded nothing of his rights; and neither the maker nor the guarantor gained any thing in either position or pocket. There resulted no benefit to the party promising, or to him for whom the promise was made; no prejudice, damage, suspension of right or possibility of loss to the guarantee. It wanted the essential of a consideration to render it better than a naked promise. Between the original parties the verdict could not find support in the evidence.

But the plaintiffs are *bona fide* indorsees of the note for valuable consideration before dishonor. Does this put them on any better footing in the case? It is clear that if the defendant did not assume the legal character of joint maker of the note, that is, an original surety or promisor through his contract, no subsequent negotiation of the note could force him into that attitude. Regarding him as a guarantor of negotiable paper, there is nothing in the law which precludes him from setting up want of consideration for such promise.

Against this view, it is urged that a guaranty, when indorsed upon negotiable paper, becomes so incorporated with it as to partake of its negotiable character, and to be transferable by the indorsement or delivery of the bill or note, that it passes by the same title, and has incident to it the same protection against defenses in the hands of a *bona fide* holder that attaches to commercial paper. But this is not a correct view of the nature and attributes of the contract. By the weight of judicial authority it is regarded as a mere personal engagement, limited to and ending with the person to whom it is addressed or by whom it is first accepted; and that unlike bills of exchange and promissory notes, it is not excepted out of the ordinary rule governing the transfer of choses in action.

I refer to a few of the decided cases supporting this rule.

In the case of *Lamourieux v. Hewit*, 5 Wend. 307, the defendant wrote and signed on a negotiable note the following contract: "I warrant the collection of the within note for value received." The note was transferred to the plaintiff, who held it when it fell due; the court ruled that the action on the guaranty could not be maintained in the name of the plaintiff, that it was a special contract

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with the payee, and any action upon it must be in his name. In *Ellis v. Brown*, 6 Barb. 282, where the action was by an indorsee of a promissory note against an irregular indorser as a guarantor as well as joint maker, the court uses this language: "It is obvious that the action cannot be maintained against the defendant as a guarantor of the note. A person who guarantees a note is in no sense a party to the note. A guaranty is a special contract and must be specially declared on. It is only where the person called the guarantor has been held by the court to be, in legal intendment, the maker of the note, that a different rule has prevailed. If the indorsement were to be regarded as a guaranty, such guaranty was made to the payee, and the action should have been brought in his name and not in that of the indorsee." In *McLaren v. Watson's Ex'rs*, 26 Wend. 425, it was held that a general guaranty of a promissory note made on a separate paper and given to the payee, the note and guaranty indorsed and transferred together to the plaintiff did not authorize suit on the guaranty in the name of the plaintiff. The cases of *Ketchell v. Burns*, 24 Wend. 456, and *Leggett v. Raymond*, 6 Hill, 639, are sometimes cited as authorities in favor of the negotiability of such a contract, but I think they fail to support the position. In the first of these cases the defendant indorsed on a promissory note the following: "For and in consideration of \$31 received of B. F. S., I hereby guarantee payment and collection of the within note to him or bearer." This note, with the indorsement, upon it was delivered by S. to the plaintiff, and he was allowed to recover; the court placing it upon the ground that its effect was that of a new note for the payment of the money upon full consideration, and as it was made payable to Spencer or bearer, it was negotiable. But in this case the ruling in *Lamourieux v. Hewit*, was mentioned with approval. The other case was that of a general guaranty written on the back of a note and signed by the payee, and this signature to the guaranty was the only indorsement of the note to the plaintiff. The real question in that case was whether the signature of the payee to the guaranty constituted as well an indorsement of the paper. It was ruled that it was a sufficient transfer of the note, and the defendant was held as an indorser.

So far as the court expressed an opinion on the subject of the negotiability of the guaranty it was emphatically against it. The same question was fully considered and a review of the cases had in

Miller v. Gaston, 2 Hill, 188, the result being against the negotiability of such a contract.

In Massachusetts the same is found to be the law. It was so decided in *True v. Fuller*, 21 Pick. 140. The suit was upon a guaranty indorsed upon a promissory note as follows : “ I guarantee the payment of the semi-annual interest of this note as well as the principal.” This was signed by the defendant, and the note was transferred by the payee to the plaintiff. In the opinion of the court, which was delivered by Chief Justice SHAW, the plaintiff was held not entitled to recover, “ because the guaranty in question was not made to him or whilst he was the holder of the note, that it was not negotiable in itself and was not made so by being written upon and intended to secure a negotiable instrument ;” and he further remarks, “ It is no more a negotiable promise than if it had been written on a separate writing referring to the note and guaranteeing it to the then holder.” To the same effect are *Tuttle v. Bartholomew*, 12 Metc. 452 ; *Belcher v. Smith*, 7 Cush. 482. The same is held in Pennsylvania. *McDoal v. Yeomans*, 8 Watts, 361.

Other cases of like import may be found in notes to 2 Pars. on Notes and Bills, 133. That author declares the weight of authority to be decidedly opposed to the negotiability of a guaranty whether indorsed upon the note or existing separately from it, and his own view is expressed as being entirely in concurrence with that legal result. See also, cases in Fell on Guar. and Sur. 298, etc.

Where the irregular indorsement grows out of a participation by the indorser in the original transaction, such as in legal contemplation would hold him as a joint maker, as where his credit is given as security for the maker on the faith of which the payee of the note accepts it — in other words, where his relation to the transaction is such that he may be considered as a party to the note — his liability passes to subsequent legal holders, with the rights that attach to commercial paper; but where his contract is strictly that of guaranty, that is, collateral to the original undertaking, it is not negotiable, possesses none of the attributes of negotiable paper, and is liable to all defenses that other non-negotiable choses in action are subject to.

It is plain then, I think, that under the evidence in this case there was no view in which the defendant Potter could be held, and the rule to show cause as to Potter should be made absolute. As to the other defendant, I see no reason why the verdict may not stand against him.

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NOTE BY THE REPORTER. — See *Dubois v. Mason*, 127 Mass. 87; s. c., 34 Am. Rep. 335. In *Harding v. Heirs and Creditors of Waters*, 6 Lea, 324, the contrary of the principal case was held. The court said: "Did this authorize the writing of a formal guaranty above Lusk's signature?"

"This question is by no means one of the first impression in this State. Many decisions have been made upon it and analogous questions by this court. In other States, and in the Supreme Court of the United States, much has been written and decided bearing upon it."

"Our first case was that of *Comparrée v. Brockway*, 11 Humph. 355, decided by this court (McKINNEY, J.) in 1850. This decision has been followed, has been criticised, has been evaded, and finally, as it seems to us, has had its force broken effectually by the decision in the case of *Rivers v. Thomas*, 1 Lea, 649; s. c., 27 Am. Rep. 784.

"For Judge McKINNEY's legal acumen and general ability, no one has a higher estimate than the writer of this opinion. An indorsement upon a paper, made by one who is not its payee, before or without the indorsement of the payee, he holds to create only the obligation of an ordinary indorser, unless there is an express agreement with him that he is to be held otherwise; a different liability, he says, could not be implied from the facts and circumstances surrounding the transaction. With this holding dissatisfaction was soon manifested at the bar, and attempts were soon made to evade its force. The decision would seem to have had its origin in a failure to take the distinction between notes made to be discounted, or sold to raise money upon, and notes given to a payee for the loan of money or for property purchased from him. When it once appeared that the paper was of the latter description, it became impossible that any force could be given to the indorsement as an ordinary one. The payee would, in such a case, be first indorser, and of course liable to the second, who would be liable to nobody. To avoid this difficulty, Judge McKINNEY suggested that the payee might make a restricted indorsement, and thus give one to whom the note might be sold, a right against the second indorser. But would not this be bad faith on the payee's part toward the second indorser, and enable him, in case he had to pay the money to a *bona fide* holder, to treat the first indorser as one who had made no restriction? Otherwise, he who having signed his name intending only to become second indorser, could be made first indorser at the will of the payee. Besides, it would not be easy to find a market for a note thus indorsed, and it would be difficult for one buying such a note to make himself out a *bona fide* holder. So that in the case of money loaned by a payee, the indorsement of a third party, though intended to mean something to the payee, would in fact mean nothing.

"The case of *Clouston v. Barbicre*, 4 Sneed, 336, decided in 1857, by Judge CARUTHERS, merely follows the case of *Comparrée v. Brockway*, and reiterates the doctrine that the agreement must be express, that is, to vary the liability of an indorser from that which regularly attaches to him. In the case of *Newell v. Williams*, 5 Sneed, 208, Judge McKINNEY says the proof of an intent to assume a larger liability than that of an ordinary indorser, must be full and satisfactory. And in *Brinkley v. Boyd*, 9 Heisk. 150, Judge SNEED says that parol proof, at law, for such a purpose is inadmissible. This series of decisions is in conflict with the course of decisions of most of the States of the Union, a great number of which are collected in the case of *Rivers v. Thomas*, decided by Judge COOPER and reported in 1 Lea, 649; s. c., 27 Am. Rep. 784. They are in conflict with the course of decisions in the Supreme Court of the United States (*Rey v. Simpson*, 22 How. 341), and with the utmost deference for the distinguished gentlemen who made them, were contrary to principle. Why, when it was once admitted that parol proof might be made with a view to show the true intent with which an irregular indorsement was made, should that proof be confined to an express agreement? Why should not facts and circumstances, sometimes as strong to show intent as an express declaration, be admitted? All of the three cases preceding that of *Brinkley v. Boyd* concede that parol proof might be made. Since the cases above mentioned of our court, several other decisions of the same court have been made bearing upon the question. The opinions in these cases, looking to the *maxim stare decisis*, have dealt tenderly with the previous course of decision, and endeavored as far as possible to reconcile themselves with them. This was consistent with sound philosophy in the progress of the law. The case of *Iser v. Cohen*, 1 Baxt. 421, decided by Judge DEADERICK in 1872, was a small advance upon the previous decisions, holding an irreg-

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ular indorser liable upon proof of facts and circumstances, short of any express agreement. In 1878, Judge COOPER, in the case of *Rivers v. Thomas*, 1 Lea, 649; s. c., 27 Am. Rep. 784, gave the opinion of the court, and although the facts there were not precisely similar to those in the case now before us, yet they involved the discussion of precisely the same principles. With every disposition on the part of the court to preserve rather than to destroy the previous decisions, beginning with *Comparee v. Brockway* and ending with *Brinkley v. Boyd*, and to reconcile them with the decisions then being made, it is manifest that in their most important feature they have been overruled. The principle established in this last case is, that all of the facts and circumstances accompanying one of these irregular indorsements may be looked at to arrive at the true intent of the party making it.

"We are of opinion that Judge CLIFFORD, in the case of *Rey v. Simpson*, 22 How. 341, has laid down a safe and true rule in regard to such irregular indorsements as the present. He says: 'When a promissory note, made payable to a particular person or order as in this case, is first indorsed by a third person, such person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor; but if the note was intended for discount, and he put his name on the back of it with the understanding of all parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as second indorser, in the commercial sense, and as such, would clearly be entitled to the privileges which belong to such indorser.' Our only dissent from this rule is, that we should regard the indorser in both of the two first cases supposed as a guarantor. The contract of guarantee can be implied from facts and circumstances attending the making of the irregular indorsement, and an express undertaking is not necessary to make such case."

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(14 Vroom, 203.)

Constitutional law—statute extending time for prosecution of offenses already barred.

A statute extending the time previously limited for the prosecution of criminal offenses is void as to offenses upon which the time previously limited has already run. (See note, p. 577.)

ERROR to Supreme Court, from conviction of misdemeanor. The opinion states the point.

The case below is reported in 13 Vroom, 208.

A. V. Schenck, for plaintiff in error.

C. T. Cowenhoven, prosecutor of the pleas of Middlesex county, for State.

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DIXON, J. An act passed March 18, 1796 (Pat. L., p. 208), entitled "An act for the punishment of crimes," provided in section 73, that no person should be prosecuted, tried or punished for any offense not punishable with death, unless the indictment for the same should be found within two years from the time of committing the offense. This law continued in force, without change, until March 14, 1879, when a proviso was added to the effect, that for a certain class of offenses, a person may be prosecuted, tried and punished "where the indictment has been or may be found within five years from the time of committing the offense." Pamph. L., 1879, p. 183.

In September, 1879, the plaintiff in error was indicted in the Middlesex Oyer for an offense of the class last mentioned, and upon his trial, it appeared that his misdemeanor was committed more than two years before March 14, 1879. He therefore insisted upon an acquittal under the statute of 1796, but the defense was overruled and he was convicted. The conviction having been affirmed by the Supreme Court, is now before this court, and the question presented by the record is, whether the defense set up at the trial is valid in law.

If the act of 1879 reached offenses, which at the time of its passage, had become dispunishable by force of the law of 1796, then the judgment below is legal, otherwise not.

Upon the trial and in argument here, the question was treated as depending solely on the power of the legislature. It was conceded that the language and purpose of the amendment of 1879 embraced the plaintiff's case, but it was denied that at so late a date a valid law could be passed to punish his crime. We will dispose of the case upon the question thus presented.

The plaintiff's first position is, that by the lapse of two years he acquired a vested right not to be prosecuted or punished for his offense, which the legislature could not take away.

In considering this position, an analogy, which is obviously suggested, is that of statutes for the limitation of civil actions.

It is well settled that such laws usually relate to the remedy and not directly to the right. They are not to be considered as elements entering into contracts, for it is said, parties do not look forward to a breach of their bargains, but to the performance. *Ogden v. Saunders*, 12 Wheat. 213; *Don v. Lippmann*, 5 Cl. & Fin. 1.

Hence in the United States, it is held that a law passed sub-

sequently to a contract, and changing the period of limitation, is not necessarily a law impairing the obligation of the contract (3 Pars. on Cont. 557), and ordinarily courts disregard the limitation fixed in the place of the contract or tort, and enforce only that of the *lex fori*. *Gulick v. Loder*, 1 Green, 68 ; *Townsend v. Jemison*, 9 How. 407.

But since it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law (3 Bl. Com. 23), it follows that where the remedy by action is tolled, the right also is legally extinguished, so far forth as that remedy was necessary for its enforcement.

Usually the bar of a statute limiting transitory actions is said not to extinguish the right, because such actions may be brought anywhere, while the statute can have no effect beyond the territory of the sovereign that enacted it ; therefore the right remains to support such action wherever the *lex fori* will permit it to be brought. But even under these statutes, if the subject-matter of an action and the opposing claimants of the right have continued within the same jurisdiction until the statutory term has expired, the title is transferred to him in whose favor the bar exists, and that title will be recognized and upheld in the tribunals of other States, as well. *Newby's Adm'rs v. Blakey*, 3 H. & M. 57 ; *Brent v. Chapman*, 5 Cr. 358 ; *Shelby v. Guy*, 11 Wheat. 361 ; *Thompson v. Caldwell*, 3 Lit. (Ky.) 137 ; Story's Conf. of Laws, § 582 b ; *Huber v. Steiner*, 2 Bing. N. C. 202 ; *Don v. Lippmann*, 5 Cl. & Fin. 1.

In regard to local actions, the bar of the local statute extinguishes the right, so far as the suit prohibited is the legal means of vindicating the right. Thus in England certain possessory actions existed for enforcing the right to possession of lands ; when these actions had become barred, the right of possession was transferred to him that before had possession only, and the former owner had the mere right of property. 3 Bl. Com. 194 ; *Taylor v. Horde*, 1 Burr. 60, 119. But when as by a Jamaica statute, it was provided that after seven years' possession of land under a deed, the act might be pleaded in bar in any suit, claim or demand brought against the possessor by any person whatsoever, then it was decided that the possession was converted into a positive, absolute title against all the world. *Beckford v. Wade*, 17 Ves. 87.

And it has been repeatedly adjudged that a statute, which bars all remedy, gives a perfect title, with all its incidents. *Knox v.*

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Cleveland, 13 Wis. 249 ; *Moore v. Luce*, 29 Penn. St. 262 ; *Leffingwell v. Warren*, 2 Black, 599 ; 2 Wash. Real Prop. 574 ; Cooley's Const. Lim. 365.

In *Moore v. Luce*, Chief Justice LEWIS said, "Laws never deliberately take away all remedy without an intention to destroy the right. When all remedies are taken away after a specified period of neglect in asserting rights, and when this is done for promoting the best interests of society, the right itself is destroyed." Said Judge SWAYNE, in *Von Hoffman v. City of Quincy*, 4 Wall. 535, 552, "Without the remedy, the contract may, in the sense of the law, be said not to exist." And WASHINGTON, J., in *Green v. Biddle*, 8 Wheat. 1, 76, "If there be no remedy, the law necessarily presumes a want of right."

Now in all these classes of cases, the courts have decided that the rights acquired by reason of these statutes of limitation, whether they were rights of property or simply rights to defeat suits, and whether the suits arose *ex contractu* or *ex delicto*, could not be taken away by the repeal or modification of the law.

In *Wright v. Oakley*, 5 Metc. 400, 401, Chief Justice SHAW intimated that it might not be proper, in technical strictness, to say that a man had a vested right to plead the statute of limitations, so that it could not be taken away by an express act of the legislature ; but he declined to give such an effect to the statute then before him or definitely to concede that any enactment could so operate. In *Ball v. Wyeth*, 99 Mass. 338, the court still expresses "grave doubt" of the authority of the legislature to give an action after the bar of the statute is complete. But other tribunals have gone further than the expression of doubts, and have distinctly denied the existence of such authority. In the following cases it was directly adjudged that the legislature had not the power: *Naught v. Oneal*, 1 Ill. 36; *Sprecker v. Wakeley*, 11 Wis. 432; *Parish v. Eager*, 15 id. 532; *Bagg's Appeal*, 43 Penn. St. 512; *McKinney v. Springer*, 8 Blackf. 506; *Stipp v. Brown*, 2 Ind. 647; *Davis v. Minor*, 1 How. (Miss.) 183; 28 Am. Dec. 325; *Woodman v. Fulton*, 47 Miss. 682; *Martin v. Martin*, 35 Ala. 560; *Girdner v. Stephens*, 1 Heisk. 280; *Atkinson v. Dunlap*, 50 Me. 111; *Ryder v. Wilson's Ex'rs*, 12 Vroom, 9.

This conclusion has usually been grounded upon the general principle that it is not within the appropriate sphere of legislative action to pass laws taking away vested rights without the fault or

neglect of their owner ; and perhaps in some States there was not, at least until recently, any express constitutional prohibition against the exercise of such a power. Nevertheless, that it was forbidden by fundamental principle, is established (to adopt the language of Chief Justice KENT, in *Dash v. Van Kleeck*, 7 Johns. 508; 5 Am. Dec. 291), by a “train of authority, declaratory of the common sense and reason of the most civilized States, ancient and modern, sufficient to put it at rest, and to cause not only the judicial, but even the legislative authority to bow with reverence to such a sanction.” But besides there is in the bill of rights, forming part of the Constitution of this State, a declaration, which I think plainly implies such an inhibition, viz., “that all men have a natural and inalienable right of enjoying and defending life and liberty and of acquiring, possessing and protecting property ;” for it seems idle to assert, in an instrument designed to indicate and limit the powers of government, that a right is natural and inalienable, if it can be destroyed or taken away by the mere will of the legislature. Moreover, there is now, I apprehend, incorporated in the Constitution of the United States, a restriction upon the States which effectually prevents the wielding of such authority. Article XIV, section 1, of the recent amendments, declares that “no State shall deprive any person of life, liberty or property, without due process of law.” It may be impossible, it certainly would be presumptuous, to attempt to frame a definition of “due process of law,” which shall embrace all and only all the cases which a just mind will perceive to be included in it ; but if an enactment of the legislature which purports simply to strip a man of his right to protect his property, be such process, then the provision is not of sufficient value to warrant its insertion in the organic law. That such a statute is not “the law of the land” or “due process of law,” is clearly averred and maintained in *Davidson v. New Orleans*, 96 U. S. 97, and in *Maxwell v. Goetschius*, 11 Vroom, 383 ; s. c., 29 Am. Rep. 242, and cases there cited.

It thus then appears to be settled by numerous decisions in civil causes, that when a right of action is barred by a statute of limitations, it cannot be revived by act of the legislature and that when such a right is so barred in favor of one having possession of property (if there be no conflicting jurisdictions), the possessor becomes the owner of the property, with all the incidents of ownership, and his title cannot be impaired by subsequent legislation.

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Whether these decisions rest upon express constitutional declarations, or upon still deeper principles, underlying all popular government, is not so important to the present inquiry as is the fact that the stability of their foundation is assured.

We come now to examine whether the rights and liabilities consequent upon crimes are analogous to those which attend civil injuries, what effect our statute of limitations purports to have upon such consequences, and whether there are as strong reasons as in civil matters for considering that effect permanent.

Before committing any offense, the citizen had a natural and absolute right to life and liberty. By his offense, the State acquired the right to deprive him of life or of liberty to the extent prescribed by the violated law. The citizen remained in possession of life and liberty, but his possession was liable to be disturbed by means of a prosecution to be instituted by the State according to law. His offense however was local, and subjected his possessions to impairment only within the jurisdiction whose laws he had broken. In these respects, the relation between the offender and the State corresponds to that between one having the possession of land without the right of possession and one entitled to invade that possession by action at law. In both cases there is a right of suit which must be pursued, if at all, within and under the laws of a single jurisdiction, and in both cases the wrong-doer holds a possession which only such legal prosecution can take away.

In view of this position of things the statute of limitations declares that no person shall be prosecuted, tried, or punished for an offense unless the indictment be found within two years after the crime. This, in effect, enacts that when the specified period shall have arrived, the right of the State to prosecute shall be gone, and the liability of the offender to be punished, to be deprived of his liberty, shall cease. Its terms not only strike down the right of action which the State had acquired by the offense, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect its language goes deeper than statutes barring civil remedies usually do. They expressly take away only the remedy by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the State has against the offender, the right to punish, at the only liability which the offender has incurred, and

declares that this right and this liability are at an end. Corresponding provisions in a statute concerning lands would undoubtedly be held to extinguish every vestige of right in him who had not asserted his claim, and to perfect the title of the possessor. Giving them the same force regarding crimes they annihilate the State's power to punish, and restore the offender's rights to their original *status*.

The next question is, whether this condition is as permanent and unassailable by subsequent legislation as it would be if it pertained to civil rights and remedies.

If the legislature, by declaring that because of the lapse of time it will withhold all remedies, transfers the property of one citizen to another, so absolutely that no after-enactment can restore it, does the legislature, by declaring that for the same cause its own right to proceed against the life and liberty of the citizen has ceased, obliterate its own claim so absolutely that no after-enactment can restore it? It should seem that he who gave a negative answer to this inquiry ought to furnish cogent reasons for his position. To the common sense, it would appear that the power of the State to waive a forfeiture to itself was at least as complete as its authority to deny remedies to its citizens, and that life and liberty were entitled to a shield as impenetrable as that of property.

But let us see whether the bases, upon which the inviolability of property is said to rest, underlie also life and liberty. It is asserted that it is not within the appropriate sphere of legislation to take away vested rights of property without the fault or neglect of their owner; that government exists to guard such rights, not to destroy them. So far as this is true, it is axiomatic; no advocate of free institutions will deny it; none can prove it. I avow the same principle as to life and liberty. But it may be alleged that in the case in hand, these rights are assailed because of the crime of their possessor. The answer is, that notwithstanding that crime, they had resumed their natural character. And if it be suggested that after the so-called resumption, they still remained subject to a change of legislative purpose as to the State's duty to punish crime, the query then arises, why rights of property acquired under limitation laws do not also remain subject to a change of legislative purpose as to the State's duty to furnish remedies for private wrongs. The duties are equally obligatory; and we are brought back to the assertion that the rights are alike protected by funda-

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mental principle, an assertion to be either accepted as an axiom or rejected.

Then, as to express restraints upon the legislature. We have seen that the bill of rights of New Jersey places first among those which are natural and inalienable that of enjoying and defending life and liberty, and that the Federal amendment enumerates these blessings before property, as possessions of which no State shall deprive any person without due process of law. Certainly no inference unfavorable to the claim of the plaintiff in error can be drawn from these provisions. But it is intimated that the prohibition against taking private property for public use without just compensation implies a prohibition against taking such property for private use, even with compensation; and it is urged, that as there is no such enactment whence to infer similar protection to life and liberty, therefore such protection is wanting. I cannot think it reasonable to draw such an inference from such premises. The same line of argumentation would lead to the position, that if there were no other express constitutional restraint, life and liberty could be taken away arbitrarily by the legislature, for either public or private convenience, and without any attempt at compensation. Such a conclusion is utterly inadmissible, because utterly repugnant to our ideas of the purposes of the social compact. On the contrary, life and liberty can be taken away by the legislature, never for private convenience, nor ever for public convenience, save in those junctures where the preservation of society is the motive for conceding the power. The personal right needs not to be proved, but the necessity of the public power must be established.

Then if on the other hand, we regard the sphere in which it is admitted that the State may invade the right of personal security, it will be evident how many others express restraints our Constitution has placed upon this power. The only province in which such authority is called into constant or even frequent exercise, is for the detection and punishment of crimes. But in this domain, the presentment or indictment of a grand jury must precede the citizen's being held to answer, except in matters particularly enumerated; he must have the privilege of the writ of *habeas corpus*, unless in rebellion or invasion the public safety requires its suspension; he is entitled to be released on reasonable bail, save in capital cases; he has the right to a speedy and public trial before an impartial jury, to be informed of the nature and cause of the

accusation against him, to be confronted with the State's witnesses, and to have compulsory process for his own, and to have the assistance of counsel in his defense; if acquitted, he cannot be again tried for the same offense; if convicted, no excessive fine or cruel and unusual punishment may be imposed. Certainly no such guards are thrown by the organic law around the rights of property, as these with which it protects life and liberty, against the State; and if it can be gathered from that instrument that the legislature cannot take away from the citizen a title or a defense for property which he has acquired under the law, *a fortiori* must it be thence deduced that such a power may not be wielded against life or liberty.

Thus we conclude that every reason which has pressed courts to ascribe finality to the limitation of civil remedies, when once it has attached, impels this court to predicate the same conclusiveness of the bar against criminal prosecutions. See *Thompson v. State*, 54 Miss. 740.

Just here it may be proper to notice two objections that are presented against this decision. One is mentioned in the opinion of the learned chief justice in this case before the Supreme Court, to wit, that it seems to run into the absurd for a criminal to assert an indefeasible right as against the legislature, not to be tried or punished for his offense after a specified time, for such a claim, he says, assumes the semblance of an assertion that the criminal act was done in reliance on such an expectation. Such is the respect entertained for this skilled jurist and logician by the bench and bar of the State, that to dissent from his deliberate conclusions creates in the mind an uneasy apprehension of mistake; but one cannot help seeing, that in making the foregoing statement, he has overlooked the fact that in civil matters, the indefeasibility of the bar is not made to at all depend upon the notion that the statutory limitation entered into the thoughts of the defendant when doing the act to be defended. This idea is expressly repudiated in the cases, for if of any force, it would make the statute unchangeable as soon as the prescribed term began to run, a claim which no court has ever sanctioned. It is a defense acquired, not the hope of one, which is indefeasible. Until the fixed period has arrived, the statute is a mere regulation of the remedy, and like other such regulations, subject to legislative control; but afterward it is a defense, not of grace, but of right; not contingent but

absolute and vested ; and like other such defenses, not to be taken away by legislative enactment.

The other objection is suggested by Mr. Bishop in his treatise on Statutory Crimes, section 266, to the effect that a criminal statute of limitations simply withholds from the courts jurisdiction over the offense after the specified period, and it is competent for the legislature to revive the old jurisdiction or create a new one, when the prosecution may proceed.

Evidently the same doctrine would upset the uniform train of decisions in civil causes—and moreover, it would be a strained and unnatural interpretation of our act to say that it simply withholds jurisdiction from the courts. Its language is “no person shall be prosecuted, tried or punished.” It does not relate to the courts, but to the person accused. The answer which under it the defendant must make to an accusation before the tribunal which once had the right to punish him is, not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that after inquiry the court must pronounce judgment of acquittal. And probably no one would contend that after such judgment any change in the law could legally subject the defendant to a second prosecution. Yet I suppose an acquittal by a court without jurisdiction is void. Hawk. Pl. Cr. bk. 2, ch. 35. It cannot be maintained then that the act impairs jurisdiction.

We now come to a second position taken by the plaintiff in error, that the statute of 1879, so far as it purports to reach his case, is an *ex post facto* law. If it be, it is expressly prohibited by both State and Federal Constitutions.

It has already been seen that at the time this act was passed, the plaintiff was, under pre-existing laws, relieved from all liability to punishment for his offense, and if there be now any such legal liability, it is because that liability has been created by the statute in review. The question therefore is, whether a law which creates a liability to punishment for a preceding offense is an *ex post facto* law.

Ex post facto laws are in a general sense enactments after the facts to which they relate, and the expression would include both criminal and civil statutes. Burrill's L. Dic., *sub nom.* In *Den v. Goldtrap*, Coxe, 272, A. D. 1795, Chief Justice KINSEY, in the Supreme Court, said of a law for the recording of pre-existing mortgages, “this act, strictly speaking, is *ex post facto*.” Not long after-

ward, the same court adjudged a statute declaring that in certain cases payments made in continental money should be credited as specie (Pat. L. p. 172), to be an *ex post facto* law, and as such, unconstitutional, 4 Halst. (Appendix) 444; and in *State v. Parkhurst*, decided in 1802, and reported in the same appendix, Chief Justice KIRKPATRICK said that a law depriving a man of one office, because of his holding some other office, might perhaps be questioned as an *ex post facto* law. See also Justice JOHNSON'S references in appendix, 2 Pet. 681.

But it has now long been settled, that as used in our Constitutions, the phrase embraces only retrospective statutes of a criminal or penal character. To what extent it includes these is not definitely determined. It has sometimes been said that at the time of the adoption of the Federal Constitution, the words had acquired a fixed meaning as a technical term; but a reference to the citations already mentioned show that this statement is not exactly true, and in *Calder v. Bull*, 3 Dall. 395, Judge CHASE says "the words *ex post facto* law have not any certain meaning attached to them." Before the Constitution, Blackstone's definition, so called, is the only one referred to as giving the words precision. I think it is doing the illustrious commentator injustice to consider his language as an attempt to define the term. He was speaking of the necessity of having rules prescribed, made known, before they became obligatory, and after mentioning one iniquitous practice in this regard, he says "there is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment on the person who has committed it." To me, this appears rather an illustration than a definition. Doubtless the class he specified was *ex post facto*, and perhaps the most glaring instance of the injustice of such laws, which was the thought he was aiming to present; but it hardly seems probable that he considered his illustration as embracing all possible cases. However this is, it cannot be disputed that the accuracy of this so-called definition was early denied, and it has never been received as complete; for a law increasing the punishment of former crimes is as clearly *ex post facto* as one inflicting punishment for a previous innocent act.

In *ex parte Garland*, 4 Wall. 333, Mr. REVERDY JOHNSON, *arguendo* (p. 365), quotes two other definitions by English writers.

viz., that such a law is one "made to meet a particular offense committed," and that it is "a law enacted purposely to take cognizance of an offense already committed." These definitions differ from Blackstone's in the only particular wherein the latter fails to cover the case in hand. They do not regard as essential the innocence of the act for which the penalty is imposed.

Turning now to authorities since the Constitution was framed, we first notice the Federalist; but all the light which it affords is in the eighty-fourth number, by Mr. Hamilton, where however he merely repeats the illustration of Justice BLACKSTONE. This therefore is not a perfect guide.

Next comes the case of *Calder v. Bull*, 3 Dall. 386, one cited more frequently than any other. Of this case it may be remarked that the only question before the court was whether a law of Connecticut granting a new hearing in a civil cause was forbidden as being an *ex post facto* law; and when the court determined that the interdict did not extend to civil statutes it decided the cause. What was said therefore by Judge CHASE as to the kind of criminal statutes prohibited was fairly *obiter dictum*. But in the course of his remarks he mentions four classes of laws which he considers *ex post facto* within the words and intention of the Constitution, and his classification has often been repeated by judges and text-writers in discussing the subject. Still it may not be presumptuous to say that doubts may be entertained whether his fourth class does not include cases outside of the prohibition, whether every law that alters the legal rules of evidence and receives different testimony from what the law required at the time of the commission of the offense, in order to convict the offender, is an *ex post facto* law. Mr. Bishop declines to assent to it, and Chief Justice BEASLEY mentions it with a "perhaps," and it is easy to see that it may trench too far upon legislative control over mere methods of procedure. But it is plain that Judge CHASE's classes extend much beyond Blackstone's expression. It seems to me also that Judge CHASE did not consider his classes as exhaustive, for he closes them with the remark that "all these and similar laws are manifestly unjust and oppressive," an allusion, doubtless, to the characteristics by which he had formulated his rules.

The statute in hand is not covered by any of these classes, unless possibly by the fourth, but as that is of questionable propriety, it may be passed by. Looking however away from his classification

to what he states to have been the motive for and principle sustaining the edict, we find him using language which easily embraces the present case. Among the unrighteous acts of the British Parliament, which moved the framers of this government to set up this restraint, he says, "at other times they inflicted punishment where the party was not by law liable to any punishment;" which means, of course, not liable by any law in existence before the unjust law itself was passed. This phrase exactly describes the operation of our statute of 1879 upon this plaintiff. The law inflicted punishment upon him who was not, by pre-existing law, liable to any punishment. Again, the judge says, "the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several States shall not pass laws after a fact done by a subject or citizen, which shall have relation to such fact and shall punish him for having done it." If this be true, then is this law forbidden; for it was passed after the act done by the plaintiff, and it had relation to such act, and punished him for having done it. He further says, "the prohibition is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation." Then behind this bulwark the plaintiff's person must be protected from punishment by this legislative act having a retrospective operation. So, in *Calder v. Bull*, the judges refer to the Constitution of Delaware as prohibiting *ex post facto* laws, in these words: "Retrospective laws punishing offenses committed before the existence of such laws are oppressive and unjust, and ought not to be made." Language could not more completely embrace this statute in its relation to the plaintiff. The words of other State Constitutions are not so plainly applicable; thus, those of Maryland and North Carolina declare "that retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore no *ex post facto* law ought to be made." One clause in this paragraph prevents the inclusion of the statute now before us in the class thus described, but it is noticeable that the interdict is not limited to that class, but extends to all *ex post facto* laws; and it is conceded that such are those providing penalties for previous acts which were criminal under other laws.

The next indication of the meaning of the phrase is Chief Justice MARSHALL's justly lauded expression in *Fletcher v. Peck*, 6 Cr. 138:

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“ An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed.” If this be an exact definition, then an act to change the penalty of murder or treason previously committed, from death to a fine, would be void. But if even MARSHALL’s terse language be as broad as Chancellor KENT declares it is, it includes the present statute, for he says, it extends to laws passed after the act and affecting a person by way of punishment for that act, either in his person or estate. 1 Kent Com. 409. That is precisely the force ascribed to this law against the plaintiff.

These instances sufficiently exhibit the forms of expression adopted by judges and authors concerning *ex post facto* laws, and from them it is perceived that among mere verbal definitions, some reach the statute now under review and some do not. But all authorities now agree that the constitutional phrase is not to be received in its literal sense, that it does not embrace all *ex post facto* laws, *i. e.*, all laws passed after the occurrences to which they relate, but its meaning is to be ascertained by considering the motives which prompted its adoption and the spirit which it was designed to embody. No one can expect to indicate in advance, *currente calamo*, all the modes in which legislation may antagonize its beneficent purpose, and it must be left for judicial tribunals, actuated by like motives and imbued with the same spirit, to pronounce, in the light of precedent decisions, upon each case as it shall arise. For the present inquiry, judgments already rendered, not *dicta*, seem to me to afford no uncertain guide, and to lead to the conclusion that the determination below was wrong.

There is a line of cases which hold that laws regulating the mode of procedure in the prosecution of antecedent crimes are not *ex post facto*. With such legislation so long as (to use the language of Judge COOLEY, Const. Lim. 272,) it does not dispense with any of those substantial protections with which the existing law surrounds the person accused of crime, no fault can be found. Of this class, I think are the cases of *Commonwealth v. Getchell*, 16 Pick. 452, and *Commonwealth v. Mott*, 21 id. 492, which are cited as supporting the judgment now before us. The legislation in review was to this effect, a statute of 1827 enacted that a person convicted of a crime, punishable by imprisonment, who had been before sentenced to like punishment, should be liable to confinement at hard labor not exceeding seven years, in addition to the penalty prescribed for his later

offense, and the prosecution for this additional punishment was to be by a separate information. A statute of 1832 provided that no convict should be sentenced under the prior act, unless he should before have been twice sentenced and twice discharged from prison. A statute of 1833 repealed that of 1832 and substantially re-enacted that of 1827. The defendant Getchell, was undergoing his second imprisonment before, during and after the existence of the act of 1832; and the court held that after its repeal and before his discharge, he was liable to be sentenced to the additional punishment. This was the posture of affairs; when convicted, pending the act of 1827, he at once became liable to the additional prosecution; then the act of 1832 suspended the prosecution until he should have been discharged from prison; then the act of 1833 restored the permission to prosecute at once. The laws of 1832 and 1833 were manifestly mere regulations of the procedure. That of 1832 did not relieve the defendant from liability to prosecution and penalty, but simply stayed the prosecution (and that in a manner not at all beneficial to him,) until his present imprisonment was ended. In Mott's case, the second offense was committed pending the act of 1827, but he was not convicted of it till after the act of 1833. It was decided that his case was not distinguishable in principle from Getchell's, and it is not evident how it could be. Chief Justice SHAW says that the act of 1832 was to meet cases of two sentences at the same term of court, and relieve them from the act of 1827; and it would have had that effect; for then there would have been liability under the early act by reason of the first sentence and second conviction, but there never could arise liability under the later act, because there could not be two discharges from prison. If such a case had come before the court, and as to that the law of 1833 had been held valid, the decision would have been in point here; but these cases are not.

The following adjudications are in principle adverse to the judgment now before us, recognizing the notion that a statute substantially imposing punishment for a previous act, which without the statute would not be so punishable, is an *ex post facto* law, although it may not be included in the letter of Judge CHASE's rules.

In *State v. Sneed*, 25 Tex. (supp.) 66, a law which attempted to remove the bar of the statute of limitations was denounced as *ex post facto*.

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State v. Keith, 63 N. C. 140, presented this point : after the prisoner's crime an act of amnesty was passed, by force of which he was relieved from liability to punishment ; subsequently this act was repealed by ordinance of the State convention ; and then the prosecution was instituted. The court decided that the ordinance was an *ex post facto* law, because it made criminal (*i e.*, punishable), what before the ratification of the ordinance was not so, and took away from the prisoner his vested right to immunity. Dr. Wharton (Crim. Pl. & Pr. § 316), borrowing almost the language of the court in *People v. Lord*, 12 Hun, 282, says " the statute [of limitations] is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense." On the other hand, it is urged that it is not permissible to consider such a statute as an amnesty or pardon, because these are always granted after the crime, and are intended to absolve the guilty, while that is enacted before the fact and is designed to protect the innocent. Neither of these grounds of distinction seems to me stable. It is not the passage of the limitation law, but its maintenance unrepealed for the requisite period after the offense, which creates the amnesty, and its very terms indicate that the guilty, and not the innocent, were those the legislator had in view ; it begins to run only on the " committing of the offense." True an innocent man may set it up, but so he may a general amnesty. It is not inapt then to call the bar of such a statute an amnesty. But name it as you will, at least the act of 1879 purported to do with the plaintiff what the North Carolina ordinance attempted to do with Keith, and for which it was adjudged unconstitutional ; it made punishable what before its passage was not so, and took from the plaintiff his vested right to immunity.

In *Hartung v. People*, 26 N. Y. 167, this was the condition of things : The prisoner had committed murder, been tried, convicted and sentenced to death, while the law provided that death should be the penalty, and the sentence of the court the mode of fixing the time for its infliction. Then she had sued out a writ of error carrying the judgment to the Court of Appeals, and pending that writ the former law had been repealed, and a law enacted to the effect that all persons then under sentence of death should be confined at hard labor in the State prison for one year, and thereafter until the governor should issue his warrant for the execution of the sentence. On this writ of error, the Court of Appeals had decided

that this change in the law rendered the judgment below erroneous, and had reversed it and ordered a new trial 22 N. Y. 95. Afterwards a law was passed restoring the statute as it existed when the murder was committed. The court decided that as to her this last act was an *ex post facto* law and unconstitutional. It is true, that in reasoning upon the subject, the court adverts to the fact that before the passage of the law the defendant had been adjudged to be punishable for murder under laws then existing; but manifestly it was the fact that she had become punishable, and not the existence of any verdict or judgment, that gave this character to the subsequent law. The verdict or judgment might protect her from legislative reach because of some other fundamental principle, but interference with judicial proceedings has never been regarded as of the essence of *ex post facto* laws. It is by their effect upon the *status* of individuals that they are to be so characterized. And such was the view of the court, for Chief Justice DENIO, in delivering the opinion, said, "by the repeal of the provisions of the Revised Statutes, and the trial and acquittal of the offender while such repealing law was in force, the act of the prisoner, though not innocent in a moral sense, would be punishable. A legislative act restoring the repealed law would have precisely the same effect as though the offense had not been punishable originally, but had been made so for the first time by the restoring act. Such a law would be within the spirit of this constitutional prohibition, and would in my opinion be void."

In the same category is the case in hand. The law prescribing punishment for the plaintiff's crime, had not indeed been repealed, but as to that offense, it had expired, and so was as if repealed (*Yeaton v. United States*, 5 Cr. 281); hence it was the same thing, with regard to that transaction, as if it had never existed. *Surtees v. Ellison*, 4 M. & R. 586; *Kay v. Goodwin*, 6 Bing. 582; Potter's Dwar. on Stat. 160. The sanction of the law was dead. The plaintiff's act stood as though it had been perpetrated in the face of a statute which forbade it, but declared that he should not be prosecuted, tried or punished for doing it. Then the act of 1879, restoring the expired law, had precisely the same effect as though the offense had not been punishable originally, but had been made so for the first time by the restoring act. Such a law is within the spirit of the constitutional prohibition.

In *In re Murphy*, 1 Woolw. 141, the defendant had been con-

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victed by the court-martial, at a time when he was subject to trial only in civil tribunals. Afterward Congress passed a law to validate such conviction. On *habeas corpus*, Justice MILLER said: "If this act be valid, the prisoner must be detained. It is evidently intended to make two provisions, one, to validate the punishment of offenders which would otherwise be illegal. * * * So far as the first point is concerned, the law is unconstitutional; undoubtedly so. No clearer case of an *ex post facto* law can be framed. * * * The prisoner, up to the time of the passage of this law, was certainly illegally imprisoned, because tried by and held under the sentence of a court which had no jurisdiction of his person or of his offense. If he be remanded it will be under an act passed subsequent to his offense, and even to his conviction. Can any law be more clearly *ex post facto*?"

So with the case of this plaintiff. It is sought to legalize his punishment, which would otherwise be illegal, by an act passed subsequent to his offense, without which he was free from lawful prosecution, not only in some courts, but in all courts and by any methods. Such a statute is void.

In addition to these decisions, the opinion of Mr. Wharton is well worthy of being cited. In a note to section 316 of Criminal Pleading and Practice, he does not hesitate to say that an act of Congress which undertakes to authorize prosecutions for offenses which prior statutes of limitation have cancelled, is an *ex post facto* law, and hence void.

The impolicy of keeping crimes, not of the deepest dye, punishable during the whole life of the offender, is sufficiently indicated by the common usage of civilized nations in fixing a period for the limitation of criminal prosecutions. The beneficent aims of such a usage are thwarted if the limitation be not absolute and irrevocable. The injustice and oppression of laws repealing the limitation, after persons have once relied upon its finality, must be apparent to all. The innocent, conscious of acts which when only partly disclosed may seem criminal, preserve the evidence of the whole truth until time has established the legal proof of innocence by barring prosecution. Then their vigilance relaxes and their evidence is lost. What more unjust than that now the legislature should abate their protection and leave them to the hazard of half-discovered facts? A guilty man, not wholly lost to honor and to hope, passes through the statutory period after his single offense, cowed by the constant

dread of detection and disgrace. Then relieved from danger, he returns to the path of rectitude, forms respectable associations, and gathers around him those who repose in his virtue and depend upon his fair fame. Now the law changes, the detective drags to light his long-buried crime; and innocent and guilty alike are overwhelmed in a common ruin. It was of grace that remission was granted; it is the spirit of injustice and oppression that withdraws it. To forbid the exercise of such power, the mandate of the Constitution stands.

There is another aspect of this case, not presented upon the argument, but in which some members of the court think it appears that the judgment below is wrong.

Statutes extending periods of limitation are not to be construed as designed to affect cases where the bar has already attached, unless no other reasonable interpretation can be applied. Angell on Lim., § 22, note.

The act of 1879 is doubtless retrospective, but every word of it, save two, may have effect and yet reach only past offenses still subject to punishment when it was enacted. These two words make the prosecution legal where "the indictment has been found within five years from the time of committing the offense." This provision is nugatory, unless it was meant to legalize indictments theretofore found more than two years after the crime. But this language does not reach the plaintiff's case; his indictment was found after the statute; and under the rule, rigorously enforced, the law may be considered as not legalizing his prosecution. If necessary to avoid injustice, I would so interpret it. The judgment below should be reversed.

Judgment reversed.

RUNYON, Chancellor, delivered a concurring opinion. VAN SYCKEL, J., delivered a dissenting opinion.

At the instance of three members of the court the following questions were put, and they were decided as follows:

1. Does the act of March 14, 1879, apply to offenses as to which, at the time of its passage, the statute of limitations had completely run?

Affirmative — The CHANCELLOR, DEPUE, MAGIE, REED, VAN SYCKEL, CLEMENT, DODD, GREEN.

Negative — DIXON, KNAPP, PARKER.

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2. Adopting this construction, is the act so far unconstitutional, as an *ex post facto* law?

Affirmative — The CHANCELLOR, DIXON, KNAPP, PARKER, REED, DODD.

Negative — DEPUE, MAGIE, VAN SYCKEL, CLEMENT, GREEN.

3. Adopting the same construction, is the act *pro tanto* invalid, as being in conflict with vested rights?

Affirmative — The CHANCELLOR, DIXON, KNAPP, MAGIE, PARKER, REED, DODD.

Negative — DEPUE, VAN SYCKEL, CLEMENT, GREEN.

4. Shall the judgment below be reversed?

Affirmative — The CHANCELLOR, DIXON, KNAPP, MAGIE, PARKER, REED, DODD.

Negative — DEPUE, VAN SYCKEL, CLEMENT, GREEN.

NOTE BY THE REPORTER.— The case of *Com. v. Duffy*, Pennsylvania Supreme Court, Jan. 1881, held that where a statute increases the time of limitation, a defendant in whose favor the original period of limitation had not fully run at the time of the passage of the act, may be indicted within the newly established time, although the time of the former limitation has run at the time of the indictment. The court said: "It is argued by the learned judge that the act is *ex post facto* if applied to past offenses, and he bases his reasoning upon the very precise and comprehensive definition given by the present chief justice in his edition of Blackstone, vol. 1, p. 47. 'An *ex post facto* law is one * * * which alters the legal rules of evidence, and makes less or different testimony than the law required at the time of the commission of the offense sufficient in order to convict the offender.' The learned judge below argues that it would be altering the rules of evidence to apply the new bar of five years to a case which was only subject to the bar of two years when the offense was committed. The reasoning is that the Commonwealth in the one case would be required to prove that the offense was committed within two years, and in the other within five, and because five years are more than two, 'the testimony required of the Commonwealth in the former case is less than in the latter.' This argument assumes that there is something more to be proved than the commission of the offense. But it will be seen at once that whether the bar be five years or two, the proof of the Commonwealth is precisely the same. The period of limitation is not a subject of proof at all. The Commonwealth proves the offense, and necessarily, as a part of the factum, the time when it was committed. If then it happens that the law interposes a bar to a conviction, if the offense was committed more than two years before the finding of the indictment, and such was the fact in a given case, there can be no conviction. But if the bar were five years, the freedom from conviction would not arise till after five years had elapsed. In each case the proof is precisely the same. Hence, both the quantum of proof and the rules of evidence are the same in both cases, and there is no change in these respects in changing the time of the bar.

"At the time the Act of 1877 was passed the defendant was not free from conviction, by force of the two years' limitation of the act of 1860. He had therefore acquired no right to an acquittal on that ground. Now an act of limitation is an act of grace purely. Especially is this the case in the matter of criminal prosecution. The State makes no contract with criminals at the time of the passage of the act of limitation that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They are entirely subject to the will of the legislature, and may be changed or repealed altogether as it may see fit to declare. Such being the character of this kind of legislation, we hold that in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limit-

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ation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws. A law enlarging or repealing a statutory bar against criminal prosecutions may therefor apply as well to past as to future cases if its terms include both classes. Such statute relates to the remedy only, and not to any property right or contract right. The act of 1877 was legally operative to enlarge the period of limitation as to the defendant, he having acquired no right of acquittal by virtue of the previous limitation, at the time of the passage of the act. That retroactive legislation is not necessarily unconstitutional, especially when it only affects remedies, has been so many times decided that a mere reference to some of the authorities will be sufficient. *Satterlee v. Matthewson*, 16 S. & R. 179; *Hepburn v. Curtis*, 7 Watts, 300; *Kenyon v. Stewart*, 8 Wr. 191; *Schenley v. Commonwealth*, 12 Casey, 29; *Waters v. Bates*, 8 Wr. 473."

In *People v. Lord*, 12 Hun, 282, the contrary doctrine was held, by the Supreme Court, by MULLIN, P. J., and TALCOTT, J., SMITH, J., dissenting. MULLIN, P. J., said. "A statute limiting the time within which indictments must be found is a surrender by the State of its right to try and punish criminal offenses at its discretion, without limit as to time. It is therefore an act of grace and favor, which is to be liberally construed, when construction is required, in favor of the criminal." Wharton says, "a mistake is sometimes made in applying to statutes of limitation in criminal suits the construction that has been given to statutes of limitation in civil suits. The two classes of statutes however are essentially different. In civil suits the statute is interposed by the legislature as an impartial arbiter between two contending parties. In the construction of the statute therefore there is no intendment to be made in favor of either party. Neither grants the right to the other, and there is therefore no question as against whom the ordinary presumptions of construction are to be made. But it is otherwise when a statute of limitation is granted by the State. Here the State is the grantor surrendering, by act of grace, its right to prosecute, and ordering the offense to be no longer the subject of prosecution. The statute is not a process to be strictly and grudgingly applied, but an amity, declaring that after a certain time oblivion shall be cast over the offense, and that the offender shall be at liberty to return to his country, and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is that statutes of limitation are to be liberally construed in favor of defendants, not only because such liberality of construction belongs to all acts of amity and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt."

JENNE V. SUTTON.

(14 Vroom, 237.)

Agency — liability of agent for tort.

The defendant as president of a political club, ordered a display of fireworks in the public street in front of a building where a meeting of the club was being held. He paid for the fire-works, the money being raised by individual subscriptions. The fireworks exploded and injured the plaintiff. *Held*, that he could recover therefor of the defendant.

ERROR to the Supreme Court. Action for personal injuries. The opinion states the case. The plaintiff had judgment below.

J. B. Vredenburgh, for plaintiff.

S. B. Ranson, for defendant.

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BEASLEY, C. J. This action was brought to recover damages for hurts received by the plaintiff by the bursting of a bomb fired in one of the public streets of Jersey City. As the use of a public highway as a place in which to fire such an explosive was illegal, and *per se* constituted a public nuisance, there can be no question with respect to the legal liability of all persons concerned in the doing of such act, or who caused or procured it to be done, for all the damages proximately resulting. The only debatable question, therefore, seems to be whether the evidence sufficiently connected the plaintiff in error, John F. Jenne, with this illegal transaction. When the case was rested at the trial by the plaintiff, an exception was taken to the refusal of the trial judge to nonsuit; and it is in this respect that the injury just alluded to arises. Was there any evidence on this head on which the jury could legally found a verdict against this defendant?

My examination of the case has led me to conclude that there was evidence of this character, to this measure: Such testimony was not entirely demonstrative, but it seems to have made up a *prima facie* case. The fire-works in question were intended to signalize the meeting of a political club, known and incorporated under the name of the Pavonia Club. The place of such meeting was in a building denominated the Catholic Institute, where it was customary to hold political meetings, and in a public street in front of which building it was likewise customary to exhibit fire-works. Mr. Jenne, the plaintiff in error, was the president of this club. The meeting on the night in question was advertised in the name of the Pavonia Club, but the expenses of the fire-works were raised by private subscription. The person who fired the fire-works in the street was an employee of the vendor of the fire-works, and being a witness, stated that one "Samuel McGee came and ordered the exhibition of the fire-works for John F. Jenne for the Pavonia Club. I was at the Catholic Institute that evening, firing off the fire works at the request of John F. Jenne; I did not see Mr. Jenne when I received the order; I went and fired off the fire-works on the strength of the order I received from Mr. McGee." Speaking of the fire-works, he said: "John F. Jenne paid for these; he paid \$12; my services were included in that bill." He further said: "I went because it was asked that a competent man be sent."

Now, in my judgment, here was an amount of evidence which unexplained would justify the finding that this defendant so partici-

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pated in this affair as to make him answerable for the consequences. Mr. McGee's statements were not objected to, and such statements, in connection with the fact that the defendant paid the bill for the fire-works so ordered, and for the services of the man who exploded them, had a strong tendency to implicate the defendant, and to show not only that he ordered the goods, but that he procured them to be used at the place in question. It is not an unreasonable presumption that he intended that these explosives should be set off in the public street, which was the usual place on the occasions of the meeting of that club. Such an act and purpose would make him responsible to the plaintiff; for it can signify nothing, under such circumstances, that he was acting in his official capacity as the president of this corporation, for all the participants in the creation of a public nuisance are liable to answer for its ill effects, without regard to the fact that they in such affair were but the agents of other persons. There was a *prima facie* case made. Let the judgment be affirmed.

Judgment affirmed.

For affirmance — THE CHANCELLOR, CHIEF JUSTICE, DEPUE, MAGIE, PARKER, SCUDDER, VAN SYCKEL, COLE, DODD, GREEN, LATHROP — 11.

For reversal — DIXON — 1.

JOHNSON V. RAMSEY.

(14 Vroom, 279.)

Negotiable instrument — accommodation indorser — agreement to vary apparent liability.

In a suit by indorsee against accommodation indorser the latter cannot be permitted to show an agreement at the time of indorsement that the liability should be joint and not successive.

SUFFICIENTLY reported in note, *ante*, 119.

Kennedy v. McKay.

KENNEDY V. MCKAY.

(14 Vroom, 288.)

Agency — liability of principal for agent's fraud.

The fraud of an agent in effecting a sale cannot be imputed to his innocent principal.

ACTION of damages for fraudulent representations. The opinion states the case. The plaintiff had judgment below.

For rule, *G. Collins*.

Contra, *Scudder & Vredenburg*.

BEASLEY, C. J. This is a suit bottomed on an alleged fraud committed by the defendants, in the sale of forty shares of the stock of the State Insurance Company to the plaintiff. The supposed deceit consisted in unfounded representations as to the financial condition of that company. The stock, at the time of the sale, was standing on the corporate books in the name of the defendant McKay, and the sale was effected by the two other defendants, who, if the plaintiff's testimony was to be credited, made the statements which the jury has found were fraudulent. Halliard, one of the defendants, permitted judgment by default to be taken against him, and the verdict has implicated all of the three defendants in the deceit of the transaction.

But this finding, so far as Mr. McKay is concerned, seems to me not to be justified by the evidence. I have altogether failed to find any testimony that connects him, in respect to any material particular, with this affair. It is quite conclusively shown that the stock in question was put on the books of the corporation in the name of Mr. McKay, without his knowledge or consent. Halliard, the president of the insurance company, had purchased these shares with sundry others, with the moneys of the company, and wishing to keep them outstanding, had resorted to the device of transferring them to the name of Mr. McKay without asking his consent or apprising him of the step thus unwarrantably taken. This was the situation when the sale in question was made by Halliard and Reid, the latter then being the secretary of the insurance company. Both Reid and McKay testify that to the time of this event the latter had no intimation from any source that he was the colorable owner of this stock, and that he had no knowledge whatever that the plaintiff

iff was minded to become a purchaser of any part of the stock of this corporation. If it be true therefore that Halliard and Reid in selling this property to the plaintiff represented it as McKay's stock, and with a fraudulent intent made false statements touching the financial condition of the company, such misconduct could not affect the defendant McKay. In the presence of this direct evidence, the circumstance relied on to connect him with the ownership of this stock or its sale are of too uncertain an import to have any controlling effect. They do not raise in my mind even a suspicion that he was implicated in this matter.

But even if we were to assume that this stock was, in reality, the property of McKay, and that Halliard and Reid were his agents to make sale of it, still it is not apparent on what legal theory this present action could be sustained. To support this suit against McKay fraud must be imputable to him, and the case is entirely destitute of all testimony tending to show that he authorized, or was privy to the utterance of the false representations in question. On the ground thus assumed, then the case would be that of a sale made by fraud-doing agents in behalf of an innocent vendor. Whatever uncertainty may at one time have prevailed in regard to the legal incidents of such a position, such uncertainty no longer exists, and the rights, under the given circumstances, of both vendor and vendee, have been plainly defined, and as I think, firmly settled by recent judicial decisions. In the light of such authorities it is clear that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a juncture the aggrieved vendee has at law two, and only two, remedies; the first being a rescission of the contract of sale and a reclamation of the money paid by him from the vendors, or a suit against the agent founded on the deceit. But in such a posture of affairs, a suit based on the fraud will not lie against the innocent vendor, on account of the deceit practiced, without his authority or knowledge, by his agent. If the situation is such that the vendee can make complete restitution, so as to put the vendor in the condition with respect to the property sold that he was in at the time of the sale, he has the right to rescind such contract of sale, and if the vendor, on a tender to that effect, refuses to return the money received in the transaction, a suit will lie for such money, but such refusal on the part of the vendor will not make him a party to the original wrong, so that he can be sued for the deceit.

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This is the doctrine declared with much clearness and force by Barons BRAMWELL and MARTIN, in the case of *Udell v. Atherton*, 7 H. & N. 172, and their views on this subject were concurred in, and the principle propounded by them adopted and enforced by the House of Lords in *Western Bank of Scotland v. Addie*, L. R., 1 Sc. App. 146. In this latter case the action was against the bank for deceit, which was alleged to consist in certain fraudulent representations, charged to have been made on a sale of stock to the plaintiff by the directors of such corporation as its agents. Lord CHELMSFORD, in giving his views, said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and suit is brought in the name of the company to seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because the company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be sustained against the company, but only against the directors personally." Lord CRANWORTH, in his opinion, puts himself on the same ground, and says: "A person defrauded by the directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." It is obvious that the doctrine embodied in this decision, which is of so great weight as to be almost entitled to stand as authoritative in this court, if applied to the present case, will have the effect of taking from the plaintiff's suit, so far as it relates to Mr. McKay, every semblance of a foundation. By bringing his action in its present form the plaintiff has given up all idea of a rescission of the contract of sale, and the consequence is, that according to the doctrine of the cases cited, he must connect this last-named defendant with the fraud by which the sale was effected, if he would obtain a judgment against him. But in this he has altogether failed.

The rule should be made absolute.

 Carson v. Jersey City Fire Insurance Company.

CARSON V. JERSEY CITY FIRE INSURANCE COMPANY.

(14 Vroom, 300.)

Insurance — ownership — unanswered questions — delivery of policy — authority of agent to change or waive — fraud.

On an application for fire insurance a warranty of ownership of the premises is not broken by the incumbrance of a mortgage.*

An unanswered inquiry as to incumbrances constitutes no warranty. †

Delivery of a policy to an agent authorized to deliver it to the insured and receive the premium, and his delivery of the policy to the insured and acceptance of a note for the premium and procuring a discount of the same for his own account, without paying the premium to the principal, constitutes a valid insurance, in spite of a provision in the policy that such agent shall be deemed the agent of the insured, and that the insurer shall not be liable until he actually receives the premium. ‡

Conditions in respect to notice and proofs of loss may be waived by an agent by parol, in spite of a provision that no agent can change the terms or conditions and the same shall not be changed or waived except in writing signed by the president or secretary. ¶

Under a condition that "all fraud by false swearing or otherwise shall cause a forfeiture," etc., mere mistake or innocent over-valuation does not constitute a defense. §

ACTION on policy of fire insurance. The opinion states the facts.

M. Beasley, Jr., and A. G. Richey, for plaintiff.

F. McGee and J. D. Bedle, for defendants.

DEPUE, J. The suit was tried at the Circuit until the evidence was in, and then the trial was by consent of counsel suspended, that questions of law might be heard before the Supreme Court.

The premises insured consisted of a flouring mill, engine, and machinery, situated in the county of Mercer. The insurance was negotiated with Thomas C. Pearce, an agent of the company, residing at Hightstown, in said county. The policy bears date Jan-

* To same effect, *Dolliver v. St. Joseph F. M. Ins. Co.* (128 Mass. 315), 35 Am. Rep. 378.

† To same effect, *Armenia Ins. Co. v. Paul*, (91 Penn. St. 520), 36 Am. Rep. 676.

‡ To same effect, *Woody v. Old Dominion Ins. Co.* (31 Gratt 362), 31 Am. Rep. 732.

¶ To same effect, *Rokes v. Amazon Ins. Co.* (51 Md. 512), 34 Am. Rep. 323.

§ To same effect, *Helbing v. Svea Ins. Co.* (54 Cal. 156), 35 Am. Rep. 72, and note, 74.

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uary 8th, 1880. In it is written the direction, "Loss, if any, payable to Israel Baldwin, mortgagee." The fire occurred February 15th, 1880.

The defense was made exclusively on the ground of non-compliance with the condition of insurance. When the testimony for the defense was in, the plaintiff offered evidence competent to meet a defense founded on a fraudulent concealment or suppression of the truth in regard to incumbrances on the property, and thereupon the defendant's counsel stated that they did not rely on fraudulent misrepresentation, or fraudulent concealment, and disclaimed any imputation of actual fraud in the application, and put themselves upon a breach of warranty and non-compliance with the conditions of insurance. This disclaimer has simplified very much the examination of the case.

The conditions of insurance are contained in the body of the policy. By the first of them, it is stipulated that if an application, survey, plan or description is referred to in the policy, it shall be considered a part of the contract and warranty by the assured. The policy was issued upon an application signed by the applicant, which is referred to in the policy, in these words, viz.: "For a more particular description reference is had to the application and survey No. 118,031, filed with this company, which is a warranty on the part of the assured, and is hereby made a part of this policy."

Where the policy in express terms refers to the application or other papers connected with the risk, and adopts them as part of the contract of insurance, they become part of the policy; and the statements therein relative to the situation, use or character of the property are warranties on the part of the assured, and the validity of the contract of insurance depends upon the truth and fulfillment of the warranties and conditions therein expressed. Wood on Ins., §137; *Jennings v. Chenango County Ins. Co.*, 2 Denio, 75; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235; *First Nat. Bk. v. Ins. Co.*, 50 N. Y. 45; *Dewees v. Manhattan Ins. Co.*, 5 Vroom, 244. I consider the incorporation of the application for insurance into this policy, so as to make it part of the contract of insurance, too clear to require discussion.

First. The only portion of the defense which is rested on matters contained in the application for insurance is that which relates to the ownership of, and incumbrances upon, the premises, embraced in the 18th and 19th subdivisions of the application, which are as

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follows: “(18.) *Ownership*. Is the mill owned and operated by the applicant? Ans. Yes, by the applicant and his son. Is any other person interested in the property; if so, state the interest? Ans. None. (19.) *Incumbrance*. Is there any incumbrance on the property? Ans. Expects to borrow \$2,500, and use the policy as a collateral. If mortgaged, state the amount?” To this question there is no answer.

It is manifest from the classification in these two subdivisions, and the inquiries specially propounded under each head, that in the former, ownership and interest had reference to the state of the legal title, and that the subject of incumbrances was dealt with exclusively in the latter subdivision.

A warranty in a policy of insurance excludes all argument in regard to its reasonableness or the probable intent of the parties. If the policy contains a condition which in law amounts to a warranty on the part of the assured, he can derive no benefit from the policy unless the condition has been literally performed. And it is immaterial to what cause non-compliance is attributable; for if it be not in fact complied with, the assured will forfeit all his rights under the policy unless the forfeiture has been waived by the insurer. Marshall on Ins. 251; *Wood v. Hartford Ins. Co.*, 13 Conn. 544; *Dewees v. Manhattan Ins. Co.*, 5 Vroom, 244. Hence, it has become a settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy. *Palmer v. Warren Ins. Co.*, 1 Story, 360; *Stone v. U. S. Casualty Ins. Co.*, 5 Vroom, 375; *State Ins. Co. v. Maackens*, 9 id. 564; Wood on Ins., § 57. “In enforcing forfeitures, the court should never search for that construction of language which must produce a forfeiture, when it will bear another reasonable construction which will not produce such results.” WALKER, J., in *Hartford Ins. Co. v. Walsh*, 54 Ill. 164; s. c., 5 Am. Rep. 115.

If the assured has an insurable interest in the property, insurance of it as his property, or by him as owner, will be valid though his title be a qualified or a mere equitable title (*Franklin Fire Ins. Co. v. Martin*, 11 Vroom, 568; s. c., 29 Am. Rep. 271; *Ins Co. v. Woodruff*, 2 Dutch. 541); and he is not bound to state the nature

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or particulars of his title unless expressly required to do so by the provisions of the policy. May on Ins. 285.

The production of the plaintiff's title showed that he was the owner of the entire legal estate in fee simple. A mortgagor is deemed seized of the lands against all the world except the mortgagee. *Thompson v. Boyd*, 1 Zab. 58. In this State the title of the mortgagee is only a title *sub modo* ; and in law as well as in common parlance, the mortgage is considered as a mere security for the debt—an incumbrance on the legal title of the mortgagor. *Kircher v. Schalk*, 10 Vroom, 335, 337. A mortgage upon property insured is not a violation of a condition against a sale, conveyance, alienation or change of title. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582. Nor is it within a prohibition against any change in the title or possession of the property, whether by sale, transfer or conveyance. *Hartford Ins. Co. v. Walsh*, 54 Ill. 164; s. c., 5 Am. Rep. 115. A mortgage is not such an alienation of real or personal property as will avoid the policy. *Jackson v. Mass. Ins. Co.* 23 Pick. 418; *Rice v. Tower*, 1 Gray, 426; *Conover v. Mutual Ins. Co.*, 3 Denio, 254. The cases of *Allen v. Charlestown Ins. Co.*, 5 Gray, 384, and *Franklin Ins. Co. v. Vaughan*, 92 U. S. 516, illustrate the strictness of construction applied to such conditions when they are invoked to work a forfeiture of the contract.

In *Ins. Co. v. Haven*, 95 U. S. 242, the owner of the fee, to whom was issued a policy containing a condition identical with the fourth condition in this policy with respect to the interest of the assured being "other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured," was held entitled to recover on his policy, although at the time it was issued there was an outstanding lease for years to a third party, which fact was neither represented to the company nor expressed in the policy.

I think there was no breach of the warranty expressed in the eighteenth subdivision of the application, which relates to the ownership of the land.

The defense under subdivision 19 in the application stands on a different ground. The premises were then subject to four mortgages—one to Hutchinson, dated April 6, 1847, for \$1,500 ; another to Cubberly, dated April 1, 1867, for \$1,000 ; the third to Taylor, dated March 31, 1877 ; the fourth to Baldwin, dated December 30, 1879, for \$2,100. If the applicant had falsely answered the inquiries

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propounded with respect to incumbrances, the policy would be avoided for a breach of a condition of insurance. But he studiously refrained from making any answers to the inquiry on the subject. The paper was incomplete in that respect.

The application was prepared by Pearce and signed by the applicant. It was then transmitted to the company, and the policy was issued directly from the company's office upon the application in its uncompleted condition. When a policy is issued on a written application for insurance, and any of the questions are left unanswered, the objection must be made before the policy is issued. A policy issued upon such an application is a waiver of the right to the information called for by the inquiry unanswered, and the contract of insurance will be considered as based only on the answers given to inquiries to which the applicant has responded. If the insurer issues a policy upon an uncompleted application for the insurance, he cannot afterward avoid the policy on the ground that [the answers were not full. Wood on Ins., §§ 151, 496 ; May on Ins., § 166 ; *Liberty Hall Association v. Housatonic Ins. Co.*, 7 Gray, 261 ; *Hall v. People's Ins. Co.*, 6 id. 185 ; *Dohn v. Farmers' Ins. Co.*, 5 Lans. 275 ; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 139.

The plaintiff at the trial, in order to meet a defense that the information with regard to incumbrances was fraudulently withheld, offered to show that Pearce, the agent of the company, filled up the application, and that the different incumbrances on the property were spoken of between him and Pearce before the application was filled up, and that therefore there was no omission to make known the existence of the incumbrances. Upon such a defense the evidence proffered was competent. *Franklin Fire Ins. Co. v. Martin*, 11 Vroom, 568, 574; s. c., 29 Am. Rep. 271, and cases cited; *Ins. Co. v. Woodruff*, 2 Dutcher, 541, 552; *Dodge County Ins. Co. v. Rogers*, 12 Wis. 337. The testimony was objected to, and on a disclaimer by the defendant's counsel of the defense of a fraudulent misrepresentation or fraudulent concealment, the evidence was withdrawn. The defense was at the trial put solely on a breach of warranty. It is therefore sufficient to say that we do not find that the applicant entered into any contract of warranty on this subject.

Second. The policy was executed at the company's office in Jersey City and sent to Pearce for delivery. He delivered it to

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Baldwin within a week from the time it was issued. One of the conditions of insurance is that the company "shall not be liable, by virtue of this policy or any renewal thereof, for any loss that may occur before the premium has actually been paid to this company." Another condition is that "no agent of this company is authorized in any respect to change the terms and conditions of this policy, and they shall neither be changed nor waived except in writing signed by the president or secretary of the company."

When the policy was delivered, Pearce took a note for the premiums on this and other policies on the same premises, delivered at the same time, and issued by other companies. In *Basch v. Humboldt Ins. Co.*, 6 Vroom, 429, it was held, upon a policy containing the same condition with respect to the pre-payment of the premium, which also contained an acknowledgement of the receipt of the premium, that the company was, on the delivery of the policy by an agent, estopped from setting up the non-payment of the premium. This policy contains no formal acknowledgment of the receipt of the premium. It recites that the company, "in consideration of \$15, and the conditions and agreements herein contained, doth insure," etc. It is not proposed to consider whether in legal effect there is any difference between these two forms of policies, where the policy has been delivered by an agent authorized to deliver it and receive the premium, if such agent has delivered the policy unconditionally, and has agreed to credit the assured and has made himself a debtor for it to the company. See *Hallock v. Ins. Co.*, 2 Dutch. 268, 276; *Trustees v. Brooklyn Ins. Co.*, 19 N. Y. 305; *New York Central Ins. Co. v. National Ins. Co.*, 20 Barb. 469. As will appear in the sequel the decision of that question is not necessary in this case.

Pearce was the agent of the company. He had been its agent for fifteen years, and had taken a great many policies for the company. He testified that the company always forwarded policies to him before it received the premiums, and that it was his duty to deliver the policies and collect the premiums. He also testified that it was the rule of the company for the agent to report once a month; that he always held the funds for a month, and sometimes longer. His commissions were deducted from the premiums when he made his remittances. The condition in this policy "that if any broker or any other person than the assured has procured this policy, he shall be deemed the agent of the assured and not of the com-

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pany," does not debar the company of the power to appoint agents and clothe them with such authority, general, special or limited, as might be advisable; and the delegation of such authority will carry with it such powers and consequences as are incident to the relation of principal and agent within the scope of the authority conferred. There can be no doubt, that under the circumstances of this case, payment to Pearce of premiums on policies negotiated by him was payment to the company. He was constituted its agent for the purpose of receiving such premiums.

The note taken by Pearce was payable to him individually and was indorsed by Baldwin. Pearce testifies that he took the note on his own responsibility, that he got it discounted at bank within a week or ten days after he received it, and perhaps in less time, and that the proceeds were passed to his credit. The note was discounted and the proceeds passed to Pearce's credit in the bank before the fire occurred. On the next day after the fire Pearce sent his account to the secretary of the company, including this premiums on the policy and other policies he had negotiated for the company, inclosing therewith his checks for these premiums less his commissions. In his letter he says, speaking of the Carson policy, "the premium was settled at the time it was due." The company having received information of the fire has not used Pearce's check. The president testified that he informed Pearce that they would not complicate matters by accepting the premium and that he could take the checks back, or if he wished might leave them with the secretary. The checks are still in the secretary's hands unused. The note was paid by Baldwin after the fire, but before it matured.

Assuming that the note was given not as payment, but only as an instrument by which to obtain the money for the premium, and that Pearce, in obtaining its discount, acted as the agent of the plaintiff, and giving to the condition of insurance the most literal interpretation it is susceptible of, as soon as the note was discounted and Pearce received the proceeds the premium was actually paid, as much so as if he had received for it a check on a bank or an order on a third person which was paid on presentation. On a state of facts much less direct and positive the court held in *Chikering v. Globe Ins. Co.*, 116 Mass. 321, that the funds of the assured had come into the hands of the agent, and were a payment of the premium within the meaning of a similar provision in a policy.

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The question of the power of an agent to waive conditions of insurance does not arise. The agent had authority to receive the premium for the company. Payment of it to him was payment to the company; and when the money for it actually came into his hands from the discounting of the note, the premium was actually paid and the policy took effect then by its own terms.

Third. Exception was taken to the substance and service of proof of loss. Proofs were served March 8th, March 28th and March 31st. The first was served within the time prescribed; the others after that to meet objections made to former proofs. Condition 8 requires that the proofs shall be in writing, signed and sworn to by the insured, and shall give all incumbrances upon the property. The proofs served were signed and sworn to by the insured. Besides the mortgages named judgments had been recovered against the insured after the application was made. With the last proof served a detached paper containing a statement of the mortgages and judgments was delivered. On the 27th of April, 1880, before this suit was commenced, and after the thirty days had expired within which the proof of loss was required, the defendant obtained the examination of Carson under oath pursuant to one of the conditions of insurance.

Failure to comply with the condition of insurance, with respect to the reasonableness or sufficiency of the preliminary proofs, may be waived by the insurer. The waiver may be by parol, although the policy provides that the conditions of insurance shall neither be changed nor waived except in writing signed by the president or secretary. Such a stipulation applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred in order to enable the assured to sue on his contract, such as giving notice and furnishing preliminary proof of loss. May on Ins., § 511; Wood on Ins., § 496; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; s. c., 11 Am. Rep. 469; *Blake v. Exchange Ins. Co.*, 12 Gray, 265; *Priest v. Citizens' Ins. Co.*, 3 Allen, 602. In this case there was competent evidence to justify a jury in finding a waiver of a literal compliance with the condition with respect to the substance and service of preliminary proofs in all matters to which objection was made.

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Fourth. The condition which provides that all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim under the policy, is available as a defense only when it appears that the assured knowingly and intentionally swore falsely, or said or did that which is claimed to be fraudulent. Wood on Ins., § 429. Mere mistake in stating facts, or an overvaluation in making out proofs of loss, is not sufficient to sustain the defense. It must appear that the erroneous statement or overvaluation was made intentionally and with a fraudulent intent. May on Ins., § 477; *Jones Mechanics' Ins. Co.*, 7 Vroom, 29; S. C., 13 Am. Rep. 405; *Gibbs v. Continental Ins. Co.*, 13 Hun, 611; *Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516; and the question is one of fact for the jury. Wood on Ins., § 429; *Ins. Co. v. Weides*, 14 Wall. 376.

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(14 Vroom, 311.)

Contempt — justice of peace — power to punish for.

A justice of the peace has no inherent power to commit for contempt.

FALSE imprisonment. The opinion states the point.

Oscar Jeffery, for plaintiff.*John T. Bird*, for defendant.

DEPUE, J. The object of the demurrer is to raise the question whether a justice of the peace sitting in the court for the trial of small causes has power to commit for a contempt committed in the presence of the court while engaged in the trial of a civil cause. The commitment of the plaintiff was for the period of ten days, for the contempt adjudged against him.

It must be conceded that the plaintiff's conduct, as averred in the plea, was outrageously improper, and that if he so misconducted himself he deserved the punishment he received. But we must not, by our disapprobation of the plaintiff's conduct, or by the justice of the punishment he received, be led away from the real

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question in issue — the power of a justice of the peace to commit for contempts when sitting in the court for the trial of small causes. If the power in question resides in the class of judicial officers to which the defendant belongs, it is a power which may be exercised for a less flagrant offense, and followed by an imprisonment for a year, or a longer term as well as for a single day, without its exercise being subject to revision or review, except in mere matters of form.

The power to commit at discretion and for a discretionary term of imprisonment is a transcendent prerogative power. "The power which the courts in Westminster Hall," said WILMOT, C. J., "have of vindicating their own authority, is coeval with their first foundation. * * * I have carefully examined to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law." *Rex v. Almon*, Wilmot's Opinions, 254. It seems to have had its foundation on the theory that contempt in the presence, or of the authority of the king's courts, was a contempt of the royal authority itself.

At common law the power to punish, by fine or imprisonment, contempts, even such as were committed in *facie curiæ*, was given to courts of record only. In 30 Eliz. it was resolved that if any contempt or disturbance to the court be committed in any court of record, the judges might set upon the offender a reasonable fine; but that courts which are not of record cannot impose a fine or commit to prison. *Griesley's case*, 8 Co. 75; *Godfrey's case*, 11 id. 43 b. None but courts of record can either fine or imprison; hence when any new authority is constituted with power to fine and imprison, the persons invested with such authority become a court of record. *Groenvelt v. Burwell*, 1 Comyn, 79. Mr. Hawkins expressly lays it down that only such courts as are courts of record may fine or imprison for contempts in the face of the court. 3 Hawk. 5, §§ 14, 15. All courts of record are the king's courts, in right of his crown and royal dignity, and therefore every court of record has authority to fine or imprison for contempt of its authority; but the courts not of record — or those at least, in which the common law is administered — are of inferior dignity, and in a less proper sense the king's courts, and therefore are not intrusted by the law with the power to fine or imprison, unless by the express provision of some act of Parliament. 3 Steph. Com. 383, 384.

Expressions are frequently used in the books distinguishing between superior and inferior courts, which are erroneously cited in support of the power of inferior courts, not of record, to commit for contempt. This classification of courts of record is made by Sir MATTHEW HALE. He says: "The courts are of two kinds: 1. Courts of record; 2. Not of record. First. Of courts of record there is this diversity, viz.: 1, supreme; 2, superior; 3, inferior." The latter he styles inferior courts of record. Hale's Analysis of the Law, 35, 36; Bac. Abr. "Courts," D, 1. This distinction is commented on by counsel and by EARLE, C. J., and WILLIS, J., in *In re Fernandez*, 10 C. B. (N. S.) 3, 27-41, and concerns only the question as to the power summarily to punish contempts committed *extra curiam* as well as in *facie curiæ*, and the form and contents of the process of commitment. *In re Sheriff of Middlesex*, 11 A. & E. 273; *Ex parte Pater*, 5 B. & S. 299. It has no pertinency to the power of inferior courts, which are not courts of record, to commit for either cause.

I do not find in the English cases any judicial adoption of a principle so broad, as that power to fine or imprison for contempts is necessarily inherent in every court of justice without regard to the grade or constitution of the court. The claim by Sir William Blackstone of such a power as resulting from the first principle of judicial establishments, was made only in behalf of the supreme courts of justice, as an inseparable attendant upon every superior tribunal. 4 Bl. Com. 286. The passage so often quoted from the opinion of Chief Justice WILMOT, in *Rex v. Almon*, *supra*, that such a power is a necessary incident of every court of justice, whether of record or not, was manifestly designed to have no broader application. The chief justice cites *Sparks v. Martyn*, 1 Vent. 1, which was an application to the King's Bench for a prohibition to restrain the Court of Admiralty from enforcing an attachment for a contempt for taking a ship and taking the sails from it, from an officer who was executing the process of the court against the ship. The King's Bench denied the prohibition, saying that the Court of Admiralty may punish one that resists the process of the court, and may fine and imprison for a contempt to the court acted in the face of the court, though it be no court of record. The High Court of Admiralty was among the most ancient of the English courts. "The admiral and Court of Admiralty have been time out of mind, and so it was said in the time of Richard

I." Com. Dig., "Admiralty," A. Its jurisdiction was civil and criminal. On the criminal side it had cognizance of piracy and of murder, and all felonies committed on the high seas. As a criminal court it possessed most extensive powers, including the power to pronounce sentence of death. Com. Dig., "Admiralty," E. As a civil court, by the custom of the court, it had power to amerce the defendant for his default, at its discretion, and to make execution thereof upon his goods, and for want of goods to take his body. 2 Bac. Abr. 746; the case of *The Admiralty*, 13 Co. 52. Inasmuch as its proceedings were according to the method of the civil law, for that reason it was not considered as a court of record. 3 Bl. Com. 69. But it had, by its constitution, the essential attribute of a court of record — power to fine and imprison — and in the magnitude of its jurisdiction, was on an equality with the courts at Westminster Hall. The court had all the qualities of a court of record, except that its procedure being regulated by its own peculiar laws and usages, its sentences, for technical reasons, were not considered as its record.

It is entirely clear that among courts proceeding according to the common law, the power of summarily punishing contempts depended upon whether or not the court was a court of record. The most recent English case on the subject was argued and decided upon that assumption. *Queen v. Lefroy*, L. R., 8 Q. B. 134. This court, in *Ex parte Kerrigan*, 4 Vroom, 345, decided that the power resides only in such courts as were courts of record recognized in the common law, and that it did not pertain to other courts simply because they had judicial functions to perform.

Reference is also frequently made to the jurisdiction at common law of the sheriff's tourne and court leet to punish contempts, as an illustration of the exercise of that power by courts of an inferior grade. But this is a misapprehension of the dignity of these courts before Magna Charta. Sir Edward Coke says that of the ancient time the sheriff had two great courts, viz., the tourne and the county court: and afterwards the view of frank pledge, or leet, was by the king divided from the tourne and granted to the lords. The tourne and leet were both king's courts of record, and were of one and the same jurisdiction. The former was a court of criminal jurisdiction, having cognizance, by indictment, over all felonies which were such at common law. Its powers were restrained by

Magna Charta, and both courts have since declined in public estimation. 1 Ins. 71 ; 4 id. 259, 261 ; 1 Hale, 69.

The power of the courts at Westminster Hall, of the Courts of Equity, the Court of Oyer and Terminer, Courts of Assize and Nisi Prius and Quarter Sessions of the peace, to punish contempts by summary proceedings, is fully established. *In re Cobbett*, 7 Q. B. 187 ; *Iechmere Charlton's case*, 2 Myl. & C. 316 ; *In re Fernandes*, 6 H. & N. 717 ; 10 C. B. (N. S.) 3 ; *Ex parte Pater*, 5 B. & S. 297 ; *Rex v. Davison*, 4 B. & Ald. 329 ; *Rex v. Clement*, id. 218. But though there are *dicta*, and perhaps decisions, in the older cases affirming such a jurisdiction in justices of the peace, yet it will be observed that in the later cases the English judges studiously refrain from an expression of opinion that the power is possessed by justices of the peace to commit for contempts, even in their presence, except when sitting in the Sessions. *Cropper v. Horton*, 8 Dow. & Ry. 166 ; *Rex v. James*, 5 B. & Ald. 894 ; Paley on Convictions, 238 n. 241 n. ; *Pettit v. Addington*, Peake N. P. 62. The two houses of Parliament have the undoubted power to punish contempts by fine or imprisonment, a power derived from the law and ancient usages of Parliament. Yet the English courts deny the same authority, in the absence of an express grant, to colonial legislatures established by act of Parliament. *Doyle v. Falconer*, L. R., 1. P. C. 328 ; *Kielly v. Carson*, 4 Moore P. C. 63 ; *Fenton v. Hampton*, 11 id. 347 ; *The Speaker, etc. v. Glass*, L. R., 3 P. C. 560 ; *Ex parte Brown*, 5 B. & S. 280.

Following common law precedents and principles, the power to summarily punish contempts by fine and imprisonment must be assigned to such of our courts as in Constitution and jurisdiction are modeled after the courts which possessed that power at common law. But with regard to courts created by act of the legislature, with limited and special statutory jurisdictions, whose powers and modes of procedure are prescribed and defined by statute, a different rule must be applied. When a new court is erected it is necessary that the jurisdiction and authority of the court be certainly set down; the court can have no other jurisdiction than is expressed in its erection, for the new court cannot prescribe. 4 Inst. 200. In such a newly-created court such incidental powers as are necessary to enable it properly to perform its judicial functions will be implied. But the extraordinary power of adjudging a contempt and fixing the fine or imprisonment, without any limitation except

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discretion, as the penalty for the offense, ought not to be conceded to such a court in the absence of a clear expression of the legislative intent to confer such a power upon it.

The court for the trial of small causes is an inferior court of limited jurisdiction, created by statute, with special statutory powers and a statutory method of procedure. Its jurisdiction is limited to certain civil actions, in which amounts within a designated sum are involved. Every step in its procedure, from the summons to final judgment and execution, is specially provided for and prescribed. As contrasted with other courts in the State, the legislative purpose to give it a subordinate position, and to confine its powers within as narrow a limit as will be consistent with its ability to perform its functions, is clearly indicated in the act by which it is created. The first section, which creates the court, declares that certain suits of a civil nature shall be cognizable "before any justice of the peace in any county in this State, who is hereby authorized to hold a court within such county, to hear, try and determine the same according to law, * * * which court shall be a court of record, and vested, for the purposes aforesaid, with all such power as is usual in courts of record of this State." Rev., p. 539. In the act establishing District Courts, which are courts in certain cities of a jurisdiction co-ordinate with that of the courts for the trial of small causes, the legislative expression is "that said courts shall be courts of record and have official seals, and all persons shall be amenable to punishment for contempt of said courts in the same manner as in other courts of record of this State, having power to punish for contempt of court." Rev., p. 1301, § 3. By the general statutes concerning evidence and juries, witnesses and jurors refusing to obey the process of the court are made liable to punishment as for contempt of the court out of which the process issued. Rev., p. 379, § 13; p. 526, § 5. In the courts for the trial of small causes, the only penalty laid upon a defaulting juror or witness is a fine not exceeding \$20, to be levied and collected by execution against the goods and chattels of the offender. Rev., p. 547, § 35.

It will be perceived that the court in question is created to hear, try and determine certain civil causes only, and that it is made a court of record, and vested, for that purpose only, with such powers as are usual in courts of record of this State. I think the language of the first section of the act, carefully guarded as it is, when taken in connection with the fact that the power to punish

for contempt is withheld from this court in cases where it is given to other courts, indicates that it was not the legislative intent to confer on this court the extraordinary powers which by the common law are exercisable under the power to punish contempts. In *Rex v. Faulkner*, 2 C., M. & R. 525, it was held that a commissioner in bankruptcy, when sitting alone, had no power to find or commit for contempt in delivering to him, when sitting in his court, a letter reflecting on his conduct, though he acted under the statute constituting the Court of Bankruptcy, which declared that the court should be a court of law and equity, and should, with any judge and commissioner thereof, have, use and exercise all the rights, incidents and privileges of a court of record, and all other rights, incidents and privileges, as fully to all intents and purposes as the same are held, exercised and enjoyed by any of his majesty's courts of law or judges at Westminster. In *ex parte Kerrigan*, this court held that the recorder of a city, who, by statute, was authorized to try all causes for violations of city ordinances, with the jurisdiction of a justice of the peace in criminal matters, and power to fine and imprison, had no power to punish by a commitment a contempt in using insulting language to him while sitting in the trial of a complaint for violating a city ordinance.

Nor is the power to commit by way of execution as a punishment for the contempt, necessary for the maintenance of order in the court or the vindication of its authority. An indictment will lie for speaking scandalous words concerning a magistrate in the execution of his office, or for a contempt, which though not a breach of the peace, amounts to an obstruction in the execution of his office. *Rex v. Ravel*, 1 Stra. 420; *Rex v. Darby*, 3 Mod. 139; *Brooker v. Commonwealth*, 12 S. & R. 175; 2 Bish. Cr. Law, § 251. It is clear that all disorders in a court-room, and all attempts, forcible or fraudulent, to obstruct the due course of public justice, are in like manner indictable. Whart. Cr. Pl. & Prac., § 955. For abusive and reproachful words spoken to a justice of the peace relative to his judicial conduct, the justice has power to cause the arrest of the offender, and require bail for his appearance to answer to an indictment and for good behavior until the next Sessions. *Richmond v. Dayton*, 10 Johns. 393; *Albright v. Lapp*, 26 Penn. St. 99. In *Spilsbury v. Micklethwaite*, 1 Taunt. 146, it was held that a sheriff presiding in a County Court, held for the election of members of Parliament, had power to order a freeholder, who interrupted the

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proceedings by disorderly conduct, to be taken into custody and carried before a justice of the peace to give security for good behavior. A justice of the peace or coroner, when in the exercise of his judicial functions, has the power to cause a bystander, whose conduct or presence in the court-room is prejudicial to the interests of justice, to be removed from the room ; and such an order, if made in the exercise of a sound judicial discretion, will be a justification in an action of trespass, and if resisted, will subject the offender to indictment for resisting the officer in the discharge of his duty. *Garnett v. Ferrand*, 6 B. & C. 611 ; *State v. Copp*, 15 N. H. 212.

The power to remove persons, who by disorderly conduct interfere with the business of the court, is a power essential to the very existence of the court and is implied in the creation of the court. It belongs to all deliberative bodies, judicial and legislative, and is necessary to their self-preservation. Without such a power, it would be impossible to perform the functions for which such bodies are created. But the power to commit for contempt is a power of inflicting a penal sentence for an offense, and the validity of the sentence will depend upon the jurisdiction of the court to pronounce it. Such a power is not a necessary incident of a court of justice, and therefore is not granted by implication. It can only be derived from the common-law or by a legislative grant of such a power. The remarks made by Sir JAMES COLVILLE in *Doyle v. Falconer*, L. R., 1 P. C. 340, when discussing the powers of a colonial legislative assembly, are quite germane to this subject. See also Maxwell on Statutes, 322.

In the present case, the justice might have caused the plaintiff to be removed from his court-room. He might have required of him bail for his appearance at court to answer to a criminal charge, and as security for good behavior. He might have committed the plaintiff into custody until the cause on trial was concluded, before he gave him a hearing ; and if the plaintiff refused or was unable to give bail, he might have committed him to jail in default of bail.

These powers, which are inherent in the judicial office, in the exercise of official duties, are amply sufficient to secure order and decorum in these courts, and to vindicate their authority. Occasionally they may not be efficacious to restrain disorderly persons from abusive and disorderly conduct ; but it is better that these tribunals

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should occasionally be subjected to the annoyance of such conduct, than that the one thousand and fifty-nine justices of the peace in commission in this State should be invested with the common-law power to commit for contempt — a power which at best is an arbitrary power, and liable to great abuses.

The plea demurred to is bad, and the demurrer should be sustained.

Demurrer sustained.

IN MATTER OF DUNN.

(14 Vroom, 359.)

Attorney — admission — clerkship.

The rule directing that every candidate for admission to practice as attorney must have served a regular clerkship of four years with some practicing attorney, implies that the applicant must actually and regularly have assisted the attorney in his business as clerk during that period, and not merely have studied law in his office.

MOTION to admit to examination for license as attorney. The opinion states the case.

W. C. Spencer, for motion.

J. R. English and *R. E. Chetwood*, contra.

DIXON, J. The question raised upon this application is whether the petitioner has complied with the third rule of this court, which provides that no person shall be admitted to examination for attorney's license unless he shall have served a regular clerkship with some practicing attorney of the court for the term of four years at least, and shall not, at any time during such clerkship, have been engaged in or pursued any business, occupation or employment incompatible with the full, fair and *bona fide* service of his clerkship.

What the applicant has done toward compliance with this rule is best shown by the following extracts from the evidence adduced in support of the application.

The attorney to whom the service is said to have been rendered testified : “ At the time Mr. Dunn entered his name, he informed

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me that he did not have sufficient means to support his family during the period of time that would be required to be devoted to his studies, but that he was gradually giving up the painting business, and had in fact at that time relinquished his shop, and would be, as he thought, able to support his family and devote considerable time to reading and without manual labor, but that he could not spend much of his time in the office ; I told him I would require of him what had been required of me under the same circumstances ; that for the first three years of his clerkship he should report to me at frequent intervals, to give me an opportunity to inquire as to what he was doing, and for the last year I would expect him to devote the most of his time to the office, and in the meantime to give as many days as he could."

The applicant himself, in answer to interrogatories, testified :

" Q. When did you enter your name as a student at law with Mr. G.? A. October, 1876. Q. During the term of your study, how much of it did you spend as an actual occupant of his office ? A. Whenever I could spend the time ; I usually was there two or three times in the week, and very frequently evenings ; I considered the evenings the best time to be there, and he was usually alone ; I did a good deal of my studying at home ; there was no day that I did not spend four or five hours either at his office or at home ; I have frequently studied as many as ten hours at my home when I felt like study ; I usually do my study day and evening, too, whenever I had opportunity ; I did some clerical work in Mr. G.'s office for him ; not a great deal — some pleadings, I think — I don't recollect how much ; I could not tell whether I did a week's work ; I should judge I had. Q. How many days will you undertake to say that you spent in his office ? A. That would be a hard thing for me to say, unless I could average them by the years since I have registered. Q. Average then ? A. Well, I usually called there a couple of days in the week, and usually evenings ; how to get at the average is something I cannot exactly tell, to swear to ; I would rather leave it at the present statement than to undertake it. Q. How many consecutive days have you ever so spent ? A. Well, not a great many — I was too busy."

We have no hesitation in concluding that this evidence does not show a compliance with the rule. It indicates that Mr. Dunn has, during the last four years, given considerable time to the

study of law, but that is not what the express provisions of the rule demand. Whether an applicant has studied sufficiently is left, by our rules, to be determined upon the examination which he must undergo ; and altogether aside from that question is the inquiry whether he has served the necessary clerkship.

The substance of this prerequisite it is not difficult to perceive. A clerkship to an attorney imports the office of assistant to an attorney, an actual occupation in and about the attorney's business and under his control. The service is to be rendered, not solely or mainly by the study of law-books, but chiefly by attending to the work of the attorney under his direction. The purpose of the rule is that the clerk shall be actually engaged in the practice of law under the guidance of his master for the stated period, so that by direct contact with an attorney's duties he may acquire the skill and facility in the profession which are necessary for enabling him to protect and promote independently the interests that clients may afterward commit to him. This is the sole object of requiring the clerkship to be served with a practicing attorney. For the mere study of legal principles, a retired counselor or a professor would be an apter guide.

The rule is a very old one in this State. It is found among the rules as revised at February Term, 1805, and printed in Coxe, p. VI. No doubt it was derived from the English statutes of 2 Geo. II., chaps. 23, 46, which required similar service.

Under these acts, the King's Bench struck an attorney's name from the roll, because it appeared that he had not, during the whole time of his preliminary clerkship, been actually employed by the attorney to whom he was articled in the proper business, practice or employment of an attorney. *In re Taylor*, 6 D. & R. 428. And in *Ex parte Hill*, 7 T. R. 452, and *In re Smith*, 10 Jur. (N. S.) 939, the alleged service was deemed insufficient, because not rendered at the place of business of the master, or one presided over by him or some partner or managing clerk representing him, and competent to instruct the applicant.

But we need not cite other cases for the interpretation of the rule. Its language is clear, and in our judgment expresses what we have above stated to be its meaning. In the present case, the applicant and the attorney seem both to have misconceived its purport. They have regarded study as equivalent to clerkship. We do not. We are not called upon to determine whether the pursuits

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of the applicant outside of his legal studies were incompatible with the full, fair and *bona fide* service of a clerkship (in which event alone are they forbidden by the rule) because, we think, there has been no attempt, either by the applicant to render or by the attorney to exact, at least during three years of the designated term, such a regular clerkship as the rule enjoins.

The motion to admit Mr. Dunn to examination must be refused.

HUGHES v. McDONOUGH.

(14 Vroom, 459.)

Proximate and remote cause — for malicious injury to business.

A declaration stated that the defendant privily loosened the nails from the shoe of a horse which he had shod, with intent to induce the owner to believe that the plaintiff had done the work badly, and to injure him in his trade of blacksmith, whereby the plaintiff lost the custom of the owner. *Held* to show a cause of action.

ACTION for maliciously injuring plaintiff in his trade. The head note and opinion show the case.

W. B. Guild, for plaintiff in error.

S. Kalisch, for defendant.

BEASLEY, C. J. The single exception taken to this record is that the wrongful act alleged to have been done by the defendant does not appear to have been so closely connected with the damages resulting to the plaintiff as to constitute an actionable tort. The contention was that the wrong was done to Van Riper; that it was his horse whose shoe was loosened, and whose foot was pricked, and that the immediate injury and damage were to him, and that consequently the damages of the plaintiff were too remote to be made the basis of a legal claim.

But this contention involves a misapplication of the legal principle, and cannot be sustained. The illegal act of the defendant had a close causal connection with the hurt done to the plaintiff, and such hurt was the natural and almost direct product of such cause. Such harmful result was sure to follow, in the usual course of things, from the specified malfeasance. The defendant is con-

upon the State to prove the guilt of the accused beyond a reasonable doubt, and therefore each of these facts must be established. The law will not presume that the female is single, nor that she is under twenty-one years of age, nor that she was seduced by promise of marriage, for that would be to reverse the order of things, by assuming the defendant's guilt and compelling him to prove his innocence. Good reputation for chastity is a quality which may or may not exist in the prosecutrix; women are not all chaste; the statute itself recognizes two classes, those of good reputation and those not of good reputation. With the former class only can the statutory crime possibly be committed. I cannot conceive how this constituent of the crime can, as a conclusion of law, be presumed to be present as a fact in the case, without overturning two rules which are conceded by every just mind to underlie a humane administration of the criminal law. These rules are:

First. That all the facts necessary to constitute the offense charged must be averred and proven by the State.

Second. The presumption of the defendant's innocence, which must prevail until his guilt is proven beyond a reasonable doubt.

No one of pure mind will doubt that women, as a class, are chaste, and that the absence of purity of character in the sex is exceptional. Society and social intercourse between families are organized and based upon this presumption. Universal experience will attest the truth of the assertion that this confidence in the virtue of woman is not misplaced. So it is believed, as a general rule, that men are law-abiding and truthful, and that their intercourse with each other is characterized by honesty and integrity. Therefore when a crime is imputed, the law interposes a shield, by presuming innocence until guilt is proven. If fraud is charged, it must be shown, it will not be presumed. If a woman is charged with an offense which involves her chastity, she will be presumed to be pure until the contrary is affirmatively established.

“All these presumptions arise in the administration of criminal justice as aids to defense, and not as instruments of assault. They are the shield of the accused, not the sword of the prosecutrix.”

Mr. Bishop in his work on Criminal Procedure says: “The defendant in a criminal case has continually present a presumption on his side; namely, the presumption of innocence. Now the proposition that in this sense the burden of proof must always be on the prosecuting power, results from the familiar maxim thus alluded

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to, that every man is to be presumed innocent until he is proved guilty. This general statement is sometimes reduced to the minuter form that every material fact necessary to constitute the crime in question must be averred in the indictment and then proved by the prosecuting power." 1 Bish. Cr. Proc., § 1057.

That good repute of the female is a constituent of the crime charged, and that it is an indispensable allegation in the indictment, is not denied. To constitute guilt it is necessary that this good repute should exist; in the absence of it the statutory crime has not been committed. If all the other facts are proved, still the defendant must be adjudged to be innocent unless the good repute is proven, or unless in the absence of proof, it is presumed as a fact in the case.

Such presumption, it is manifest, would destroy the presumption of innocence, which is ever present as a protection to the accused, and substitute for it the presumption of guilt.

A woman who comes into court with a bastard child in her arms is not a representative of her sex; happily she represents a very insignificant portion of it. The fact that she has sacrificed that virtue which was her glittering crown casts such a shadow upon her, that in the most charitable view of the case, it should be left without presumption either way, to be determined by competent evidence what her prior repute has been. Her immoral conduct, unless mitigating circumstances are shown, classes her with the vicious and disreputable, and as to her negatives the presumption of purity so universally accorded to her sex. The question is not whether the vast majority of females are of good repute, but whether in this case it shall be presumed as a fact against the defendant that the woman with whom the crime is alleged to have been committed, and who carries with her the evidence of her shame, is of good repute. The rule, if well founded, must be of universal application, and involves the broad proposition that of the entire class of women who bear illegitimate children, it must be presumed that every one who may prefer a charge of this kind is of good repute for chastity. It will be more reasonable to reverse the presumption.

If the prosecutrix was upon trial for an offense which impeached her prior purity, the law would humanely presume that no infirmity in that respect existed, but when the character of this defendant, who is equally entitled to the presumption of innocence, is assailed, the fact of her good repute to overthrow and destroy that presumption must be affirmatively established by the prosecution.

Good repute for chastity is susceptible of proof in the same way as good reputation for truth or honesty. Testimony of persons from the circle in which she moves that they had never heard her reputation called in question would be competent evidence of the fact.

The good character even of a defendant on trial under indictment is not presumed; his innocence is presumed, but not his good character. If his good character were presumed, as a weapon of his defense, then manifestly the State might, in the first instance, offer evidence to impeach the good character upon which the defendant relied. All the books agree that until the defendant offers affirmative evidence of his good character, it is not competent for the State to attack it. Roscoe's Cr. Ev. 98; 1 Whart. Cr. L., § 638; 3 Greenl. Ev., § 25.

On an indictment for larceny, the presumption will not arise that the defendant is of good character for honesty, because the masses of mankind are honest. Such character is a fact which the defendant may prove in his explanation. In the absence of proof, the law indulges in no presumption that his character is either good or bad, and the jury, without regard to that, must base their verdict solely on the evidence adduced.

The question involved here has received judicial consideration in a number of cases.

The earliest one to which my attention has been called is *Crozier v. People*, 1 Park. Cr. 453, where the words used in defining the crime were "chaste character," instead of "good repute for chastity." The court said, "That in the absence of evidence, chastity is to be presumed — that it comes within the rule that good character will be presumed until the contrary is shown."

It seems to me that no support for this view of the statute can be derived from the rule with respect to good character. The rule of evidence which requires a jury to accept the testimony of a witness, unless it is inherently improbable, or unless it is discredited by circumstances which appear in the case, or by evidence impeaching the veracity of the witness, cannot be applied to the female in the relation she bears to the statutory offense. It is not a question as to the persuasive force of her testimony, or as to the rules of evidence which govern it, but as to whether a constituent part of the offense imputed to the defendant is present in this case. She has avowedly participated with the defendant in a violation

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of the criminal law, and she must be regarded as *in pari delicto*, until those material facts (of which her good repute is one) are shown to exist, which aggravate the character of the *delictum*, and make the defendant alone amenable to the higher statutory crime. To assert that a woman establishes a claim before the law to the presumption of good repute for chastity, when she admits her dereliction, seems contrary to reason and propriety, and places her upon the same plane with those whose lives have been blameless.

The New York cases hold the words "previous chaste character," in the statute of that State, to mean actual personal virtue, and not reputation, which is the estimate of character formed by the public. There is a distinction between actual personal virtue and "good repute for chastity," as used in our statute. The former may be preserved, while the latter is impaired by indiscreet conduct. It does not necessarily follow that they are co-existent. Therefore, if presumption is permitted to dispense with the necessity for proof, the fact of her good repute, as well as her personal chastity, must be presumed.

Andre v. State, 5 Iowa, 396, and *State v. Higdon*, 32 id. 262, relying upon the New York case, applied the same rule.

People v. Roderigas, 49 Cal. 9, was an indictment under a statute making it indictable to entice an unmarried female of previous chaste character from her home for the purpose of prostitution. The indictment omitted to charge that the female was of previous chaste character. On demurrer to the indictment, the court held that character in this respect was a fact which must not only be alleged, but also established by the prosecution, in order to convict; that it was not a presumption of law to be indulged against the counter presumption of innocence.

West v. State, 1 Wis. 186, is a well-considered case to the same effect.

The latest declaration on the subject is that of the Massachusetts Supreme Court, April Term, 1881, in *Commonwealth v. Whittaker*, "that in an indictment under a statute for enticing to a house of ill fame, for the purposes of prostitution, two women of chaste life and conversation, the chastity of the women must be proved by the State in the same way as any other material allegation in the indictment. If the women were unchaste no offense was committed within the meaning of the statute, and their chastity must therefore be established as laid in the indictment, by affirmative proof."

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The court below erred in permitting the jury to presume, as a fact, that which it was incumbent on the State to maintain by affirmative proof.

[Omitting minor matter.]

For the reason before stated the judgment should be reversed and a new trial ordered.

For affirmance — WHITAKER — 1.

For reversal — The CHANCELLOR, CHIEF JUSTICE, DEPUE, VAN SYCKEL, COLE, DODD. GREEN, LATHROP — 8.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

DUNNING V. LEAVITT.

(85 N. Y. 80.)

Mortgage — assumption by grantee — grantee's eviction by paramount title.

Where a grantee under a warranty deed, having assumed to pay a mortgage on the premises as part of the consideration, is evicted by paramount title, the holder of the mortgage cannot enforce the covenant.

ACTION of foreclosure of a real mortgage. The opinion and head note show the point. The defendant had judgment at trial, which was reversed at General Term.

Sidney S. Harris, for appellant.

D. P. Barnard, for respondents.

ANDREWS, J. The assumption clause, in the deed from Fuller to Mrs. Leavitt, was in effect a covenant on her part to pay the plaintiff's mortgage as part of the purchase-price of the land. Her grantor Fuller in his conveyance from the mortgagors had bound himself by a similar covenant. If the covenant by Mrs. Leavitt to pay the mortgage is still binding upon her, no doubt can be enter-

tained of the right of the plaintiffs in this action to enforce it for their security, and to a judgment over against her for any deficiency which may arise on the sale of the mortgaged premises. *Halsey v. Reed*, 9 Paige, 446 ; *Burr v. Beers*, 24 N. Y. 178.

But the consideration for her covenant wholly failed upon her eviction from the premises under paramount title. The grantors of Fuller had no title or estate in the land when they executed the mortgage, or when they conveyed to him, nor did Fuller have any when he conveyed to the defendant. The legal title was in the Howell heirs, and the defendant in 1858 was evicted under judgment founded upon their title. The substantial consideration for the defendant's assumption of the mortgage was the conveyance of a title by Fuller. Fuller covenanted to convey a good title, and the supposed acquisition of such title by his conveyance was the real consideration of her covenant. It is true, she acquired possession with the deed, but of that she has been deprived, and the rents and profits during her possession were in law received to the use of the real owners of the land.

It was said by the chancellor, in *Tallmadge v. Wallis*, 25 Wend. 117, that upon an eviction under paramount title, the consideration for a note or bond given by a purchaser for the purchase-money of the land wholly failed, and that covenants of title in the deed of the grantor could not be regarded as a consideration which would support the promise to pay. This doctrine has been held in other cases and is in accordance with the general current of authority. *Knapp v. Lee*, 3 Pick. 452 ; *Rice v. Goddard*, 14 id. 293 ; *Trask v. Vinson*, 20 id. 105 ; Rawle on Cov. for Tit. 607. In *Rice v. Goddard*, the court say : " The promise is not made for a promise, but for the land ; the moving cause is the land ; and if that fails to pass, the promise is a mere *nudum pactum*." The authorities sustain the proposition that if Fuller had paid the mortgage in fulfillment of the covenant in his deed from the Fishers, and had brought an action against Mrs. Leavitt on her covenant to pay the mortgage, or if Mrs. Leavitt had been the mortgagor, and the plaintiffs had brought an action on her bond given with the mortgage, neither Fuller in the one case, nor the plaintiffs in the other, could have recovered. The facts found sustain the defense of a total failure of consideration for the defendant's covenant.

On what principle then can it be held that the plaintiffs can recover against Mrs. Leavitt in this action, on a cause of action which

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could not have been enforced against her by Fuller, her immediate promisee, if he had paid the mortgage debt. The action cannot be sustained on the principle of *Halsey v. Reed*, because there is no fund in the hands of Mrs. Leavitt, which, as between her and Fuller, she is equitably bound to apply to relieve him from his covenant to pay the mortgage. The land has been taken from her by a paramount title and the land was the only source from which the supposed fund was to arise. The acquisition of the title under the conveyance from Fuller was the consideration for her covenant, and no title was acquired. There can be no subrogation in equity for there is no liability of Mrs. Leavitt to Fuller, to which the right of subrogation can attach. It is said that the action can be sustained upon the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, and kindred cases. But I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void as between the promisor and promisee, for fraud, or want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication should be found. The party suing upon the promise, in cases like *Lawrence v. Fox*, is in truth asserting a derivative right. In *Vrooman v. Turner*, 69 N. Y. 280; s. c., 25 Am. Rep. 195, it was held that an assumption clause in a deed did not give a right of action to the mortgagee, where the grantor was not himself liable to pay the mortgage debt, although in that case there was ample consideration for the promise of the defendant.

There is no justice in holding that an action on such a promise is not subject to the equities between the original parties springing out of the transaction or contract between them. It may be true that the promise cannot be released or discharged by the promisee, after the rights of the party for whose benefit it is said to have been made have attached. But it would be contrary to justice or good sense to hold that one who comes in by what Judge ALLEN, in *Vrooman v. Turner*, calls "the privity of substitution," should acquire a better right against the promisor than the promisee himself had. This case is an illustration. The plaintiffs, when they took their mortgage, did not rely upon the covenant they now seek to enforce. The covenant was not made until several years afterward. There was no consideration for it passing between the plaintiffs and Mrs. Leavitt. They now seek to avail themselves of it, and insist

that although the consideration has failed, this defense is not available to the defendant, and that Mrs. Leavitt, although she has paid \$10,000 in cash for property to which her grantor had no title, must pay \$15,000 more, if need be, and be remitted for her remedy to the covenants in her deed, which may, from the insolvency of her grantor, or other reasons, be wholly worthless. The plaintiffs have nothing to sell on their mortgage, and if they can hold Mrs. Leavitt for the deficiency, they will be able to shift the burden of a practically unsecured claim upon a party with whom they have had no dealing whatever.

The case of *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, gives no countenance to this claim. The conveyance, which contained the assumption clause, was a quit-claim deed with a covenant by the grantor against his own acts only, and it was not claimed that this covenant had been broken. The defendant, so far as appears, took and retained possession of the granted premises, and was in possession when the action was brought. His defense was that the title to a part of the land conveyed had failed, or was never in the grantor. This was clearly no defense to his agreement to pay the mortgage, for two reasons: first, he got by his deed all he bargained for; and second, he could not detain the purchase-money, or refuse to pay it, so long as he was not evicted, and retained possession of the land. *Abbott v. Allen*, 2 Johns. Ch. 519; 7 Am. Dec. 554; *Leggett v. McCarthy*, 3 Edw. Ch. 124; *Platt v. Gilchrist*, 3 Sandf. 118; Rawle on Cov. for Tit. 588.

The principle that a mortgagee who seeks to avail himself of an assumption clause in a subsequent deed of the mortgaged premises takes under and through the grantor, and is subject to defenses arising out of the contract or transaction between the original parties to the deed, is supported by *Flagg v. Munger*, 9 N. Y. 483. In that case, concurrently with the execution of the deed containing an assumption clause, a sealed agreement or bond was executed between the parties to the deed, to the effect, that in a certain event (which subsequently happened), the grantee should not be bound to pay any part of the mortgage assumed, "any thing contained in the deed to the contrary notwithstanding"; and it was held, in an action to foreclose the mortgage, that by force of the agreement the purchaser could not be charged with the deficiency.

I am of opinion that the defense of Mrs. Leavitt was made out. She was not the assignee of the \$1,800 mortgage. That mortgage

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passed, if to any one, to the plaintiffs, upon the execution of the mortgage.

For the reason herein stated, the order of the General Term should be reversed, and the judgment of the Special Term affirmed.

Judgment accordingly.

FOLGER, C. J., and EARL, J., dissenting, and DANFORTH, J., not voting.

ACKERMAN V. HUNSICKER.

(85 N. Y. 43.)

Mortgage — to secure future advances — preference over subsequent judgment.

A mortgage to secure future indorsements, duly recorded, has preference over a judgment subsequently entered against the mortgagor, whether such indorsement were made before or after the entry of the judgment.

ACTION to foreclose a real mortgage. The opinion states the point. The plaintiff had judgment at trial, which was reversed at General Term.

Cornelius E. Stephens, for appellants.

George Barrow, for respondents.

ANDREWS, J. The mortgage from Levi to the plaintiff was given to secure the mortgagee for any indorsements he had made, or should thereafter make, for the mortgagor, or the firm of Levi & Miller, to the amount of \$6,000. It was dated May 2, 1874, and was recorded May 3, 1874. The first indorsement was made May 7, 1874, and the last October, 16, 1874. The plaintiff has been compelled to pay the indorsed paper, and has advanced for that purpose the sum of nearly \$5,000, over and above all payments made by the mortgagor. This action is brought to foreclose the mortgage, and the only controversy relates to the priority of lien as between the mortgagee and judgment creditors of the mortgagor, whose judgments were obtained subsequent to the mortgage, but prior to the indorsement by the plaintiff, of some of the notes, which enter into and form a part of the mortgage debt.

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land by liens having priority of the mortgage, and then applied to the plaintiff for, and procured further indorsements.

If the judgments have a preference over the plaintiff's mortgage as to the indorsements made after the judgments were docketed, it must result from a superior equity of the judgment creditors, or from the effect of docketing the judgments as constructive notice to the plaintiffs of their existence. The authorities are clear to the point that upon general principles of equity, no such preference can be claimed. In *Gordon v. Graham*, 2 Eq. Cas. Abr. 598, Lord Chancellor COWPER is reported to have held that a first mortgagee in a mortgage covering future advances has priority not only for what may be due to him at the time of a second mortgage, but also for advances made by him after notice of the second mortgage. This case was doubted in England as to the point reported to have been decided, that the first mortgagee was entitled to a preference for advances made after notice of the second mortgage, and in *Hopkinson v. Rolt*, 9 H. L. Cas. 514, this doctrine was overruled; but the court distinctly recognized and affirmed the doctrine that the first mortgagee was protected as to advances made after the second mortgage without notice. The case of *Shirras v. Caig*, 7 Cr. 34, is a leading case in this country upon this point. The mortgage in that case was executed to secure existing debts and future advances. The mortgagors subsequently conveyed the equity of redemption to the defendants, who were *bona fide* purchasers without notice of the plaintiffs' mortgage, and one of the questions was whether the mortgagees who had made advances to the mortgagors on the faith of the mortgage after they had conveyed to the defendants, but without notice of their title, could enforce the mortgage for such advances, and it was held that they could, MARSHALL, C. J., saying that the mortgage stood as security for "the payment of debts still remaining due to them, which were either due at the date of the mortgage, or were afterward contracted upon its faith, either by advances actually made, or incurred, prior to the receipt of actual notice of the subsequent title of the defendants." The effect of the registry laws was not involved, and the case was decided upon the general equities. The advances in *Shirras v. Caig* were optional; that is, the mortgagees were not bound to make them; and the same is true of the advances in *Gordon v. Graham*. *Shirras v. Caig* has been frequently cited with approval by the courts in this State, and its authority, so far as I know, has not

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been questioned. *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320; *Griffin v. Burtnett*, 4 Edw. Ch. 673; *Truscott v. King*, *supra*; *Robinson v. Williams*, 22 N. Y. 380. It must, I think, be conceded that according to general principles of equity, the lien of the plaintiff's mortgage is superior to the lien of the judgments, as well for indorsements made prior to their rendition, as for those subsequently made without notice.

It remains to consider whether, under the statutory system for the registry of liens, the docketing of the judgments was constructive notice to the plaintiff. If the docketing of the judgments was constructive notice to him of their existence, then unquestionably the judgments have preference to the plaintiff's mortgage as to all advances subsequently made.

The general principle of construction of the registry laws upon the point of notice is, that the registration of incumbrances is notice to subsequent incumbrancers only. They are prospective and not retrospective in their operation. *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *King v. McVickar*, 3 Sandf. Ch. 192; *Howard Insurance Company v. Halsey*, 8 N. Y. 271. The plaintiff's mortgage was made and first recorded, and regarding these facts only, the mortgage was the prior lien. It is claimed however that the mortgage did not become an actual lien or incumbrance until the indorsements were made, and that as to each indorsement it became in effect a new mortgage, as of the time when such indorsement was made, and that as to indorsements made subsequent to the docketing of the judgments, the mortgage must be deemed a subsequent lien. It is manifestly true that the mortgage did not become an actual charge on the land, so as to be enforceable by the plaintiff, until he had incurred liability as indorser. But the plaintiff's mortgage was an instrument capable of being recorded under the statute, before any liability had been incurred. It is the general practice to record mortgages and docket judgments, taken to secure future advances and contemplated liabilities, before an actual indebtedness arises. On being recorded, the record is notice to subsequent purchasers and incumbrancers, and they are put upon inquiry and have the means of ascertaining to what extent advances have been made; and by notice, to prevent further advances to their prejudice. In *Truscott v. King*, 6 N. Y. 147, judgment had been entered on a bond and warrant of attorney for \$20,000, to secure existing and future liabilities, and JEWETT,

J., said, there could be no doubt that the judgment in its inception was a valid security upon the land to the full amount, whether a debt only in whole or part then existed, if it was agreed at the time that it should be given as an indemnity for advances thereafter to be made, or such advances were thereafter made. In *Robinson v. Williams*, 22 N. Y. 386, a mortgage had been executed to secure future liabilities of the mortgagor to the Hollister bank, on paper which might be discounted by the bank for the mortgagor. The mortgage was recorded on the day it was executed, and before any liabilities had been incurred. DAVIES, J., in giving the opinion of the court, said: "The recording of the mortgage was notice that the Hollister bank had a mortgage on the premises for the purposes therein specified." It does not, I think, aid the argument for the judgment creditors, that the plaintiff had no claim on the land for the indorsements in question until after the docketing of the judgments, or that by our law a mortgage is a mere lien or security, and not a title. The mortgage when executed was a conveyance within the recording act, and the plaintiff was entitled to put it upon record. It was a potential lien for its full amount, of which subsequent purchasers or incumbrancers had notice. They were informed by the record of the existence of a bond containing the condition upon which the mortgage was given, and through that of the agreement between the parties, that the interest of the mortgagor in the land, as it existed at the date of the mortgage, was pledged for any indorsements which the plaintiff might make up to the limit fixed ; for this, as we have said, was the plain reading of the transaction. It would be inequitable to permit third persons to deal with the mortgage in respect to the land, to the prejudice of the plaintiff's security, without notice to him, or to allow a subsequent purchaser or incumbrancer, having notice by the record, to acquire a preference over the mortgage, for indorsements made upon the faith of the mortgage, after the second incumbrance, in ignorance of the intervening lien or title.

The question presented in this case has not been decided in this State by the court of last resort. In *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320, the chancellor, after referring to the observation of the court in *Livingston v. McInlay*, 16 Johns. 165, that if it was a part of the original agreement, a judgment might be entered as a security for future advances beyond the amount then actually due,

in like manner as a mortgage may be held as a security for future advances, said : " The limitation to this doctrine I should think would be, that when a subsequent judgment or mortgage intervened, further advances after that period could not be covered." The remark of the chancellor has been repeated in subsequent cases. *Lansing v. Woodworth*, 1 Sandf. Ch. 43 ; *Barry v. Mer. Ex. Co.*, id. 280 ; *Goodhue v. Berrien*, 2 id. 630. What was said by the chancellor in *Brinkerhoff v. Marvin*, was unnecessary to the decision of the case, but with the qualification that the first incumbrancer had notice of the intervening right when the subsequent advances were made, the observation is not open to controversy. Neither in that, nor any of the subsequent cases referred to, was it material to decide, whether the record of the subsequent incumbrance was notice to the party holding the prior lien, and in none of them was this question considered. In *Craig v. Tappin*, 2 Sandf. Ch. 78, it does not appear whether the first mortgagee had notice of the second mortgage when the subsequent advances were made. He knew that the second mortgage was to be given, and the inference that he knew of its existence when the advances were made, is not an unreasonable one. In *Truscott v. King*, 6 Barb. 346, the Supreme Court expressly decided the point involved in this case in accordance with the view I have expressed. The judgment of the General Term was reversed in this court on another point, but one of the judges who wrote an opinion for reversal expressed his concurrence in the views expressed by Judge PARKER, in the court below, upon the point now in controversy. See opinion of EDWARDS, J., 6 N. Y. 166. The adjudications in the courts of other States upon the question are conflicting. It would not be profitable to refer to them at length. They will be found cited in *Jones on Mortgages*, § 364 *et seq.*

The doctrine that a party who takes a mortgage to secure further optional advances, upon recording his mortgage is protected against intervening liens, for advances made upon the faith and within the limits of the security, until he has notice of such intervening lien, and that the recording of the subsequent lien is not constructive notice to him, has, we think, been generally accepted as the law of the State, at least since the decision in *Truscott v. King*. It would not be wise, under the circumstances, now to adopt the opposite view, even though we should regard it as better supported by reason. It seems to us however that the doctrine which we have affirmed in

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this case is most consistent with equity, and establishes a rule which is reasonable, and easy of application. The opposite rule imposes the burden of notice and vigilance upon the wrong person. The party taking the subsequent security may protect himself by notice, and as is said by Mr. Jarman in his notes to Bytherwood's Conveyancing: "No person ought to accept a security subject to a mortgage authorizing future advances, without treating it as an actual advancement to that extent."

These views lead to a reversal of the order of the General Term and an affirmance of the judgment entered upon the report of the referee.

All concur.

Order reversed and judgment affirmed.

Judgment affirmed.

SLATER V. JEWETT.

(85 N. Y. 61.)

Master and servant — negligence — of co-servant.

A fireman on a railway train was killed by a collision between his train and another which was behind time. It was the custom and rule of the company, when a train was behind time, to move it in conformity to telegraphic orders from the train dispatcher, to be delivered by the receiving operator to the conductor and engineer in presence of one another. In this instance the train dispatcher telegraphed, directing the late train to await the other at a specified station. The operator gave the message to the conductor but not to the engineer; the conductor receipted for it in the engineer's name, without the engineer's knowledge; and the operator advised the train dispatcher that it had been duly communicated. The conductor forgot to deliver the order to the engineer, and the engineer proceeded, and thus caused the collision. It did not appear but that the conductor and operator were competent and skillful, and it appeared that the rule had worked well for several years. *Held*, that the negligence was that of fellow servants of the deceased, and there could be no recovery therefor against the company.

ACTION of damages for negligence causing death. The opinion states the case. The defendant had judgment below.

John H. Milburn, for appellant.

James F. Gluck, for respondent.

FOLGER, C. J. This action is brought by the plaintiffs as administrators to recover damages for the death of Adelbert D. Slater, their intestate. The cause of his death was the collision of two engines, each drawing a train on the Erie railway operated by the defendant as receiver. It is claimed that the collision happened from negligence chargeable to the defendant though not proceeding immediately from him. The intestate was in the service of the defendant as a fireman on one of the engines that came together. The immediate negligence that caused the accident and the death was that of the conductor on the train meeting that on which the intestate was serving, co-operating with that of a telegraphic operator at Salamanca, a station on the defendant's road. The latter having omitted to give to the engineer the orders received from the train dispatcher as to the place where the two trains should meet, which his instructions required him to do, and having reported a performance of his duty, and the former having signed the engineer's name without his knowledge to an acknowledgment and receipt of order, and then having failed to communicate the order to him; in consequence of which the engineer went on with his train, instead of waiting at the station designated until the other train came up.

The complaint avers, that it was the duty of the defendant to employ competent, trustworthy and skillful men, and to make proper regulations for the running of his trains so as to insure the safety of persons operating the same, and to provide, as far as practicable, against accident and injury to them in their employment, and in the performance of their service for him. This averment correctly states the duty of the defendant, unless it overstates it when it sets his duty at so high a mark, as that of an insurer of the safety of his servants. The measure of the master's duty to his servants is reasonable care, having relation to the parties, to the business in which they are engaged, and the exigencies which require vigilance and attention, and conforming to the circumstances in which it is to be exerted. We agree that the defendant was bound to do all else that the averment puts upon him, unless it is read as making him a guarantor of the safety of his servants. The complaint avers that the defendant failed to employ proper and competent persons to manage and run his trains, and proper and suitable persons to give orders and information in respect thereto and properly to communicate the same to engineers and conductors of trains; and

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that he failed to make and enforce proper and reasonable rules and regulations for the running of his trains. The proofs of the plaintiffs did not seek to introduce into the case any other element of lack of duty in the defendant than these thus averred. And we think that the case is clear upon the proofs, that the defendant made no failure of duty, unless it was in the enforcement of the rules and regulations made by him for the running of his trains. Whether he failed in that is, we think, a question of law properly brought up by some of the exceptions taken at Circuit by the defendant. It is not to be questioned that the telegraph operator and the conductor of the train were negligent, and that from their careless omission of duty and disobedience of rules the accident resulted. The rules that had been given to them for their guidance had been prepared with great care, were minute, explicit and plain, and exceedingly well devised for safety. They had been in operation for several years before the disaster, and no accident had ever taken place in the use of them. The train-dispatcher, who, concededly, was in the place of the defendant, had strictly observed these rules in this instance, and had received all the assurance needful and required by them, that they had been observed by all concerned.

Some contention was made on the argument, that there was no proof that it was not an exceptional and unprecedented thing to interfere, as was done in this instance, with the moving of the two trains, and that no cause was shown for an interference with them. The case shows clearly that it was the usage of the defendant and his predecessor, the Erie Railway Company, to govern and direct the movement of trains by such order, and that there was reason for it in this instance. The order given was a special one, by reason of delay; but by special is not to be understood unusual and unprovided for. For nine years these rules had been in operation, and the witness who testifies to that, so applies his words as to plainly indicate that they had been in use in giving like directions to engineers and conductors on like occasions of delay. The proof shows that the time-card is the general order, and it comes from the superintendent. An order varying it on a special occasion comes from the train-dispatcher. The special order is as much provided for by the general regulations as the general time-card or other general rules. It is the conductor's duty to obey the special order, which supersedes, for the particular train, the general order. A special order to stop at a station, having been received,

there is no right to go beyond that station until further direction. The rules proven and set forth in the case recognize the usage to stop and move trains by special order varying for the nonce the general time-card. Indeed, as we may take judicial notice of the way in which banks and like public institutions do business (*Agawam Bank v. Strever*, 18 N. Y. 502), so may we, that the great railways of the land are managed in the every-day practical running of them, by overlooking officers at distant places, who use the telegraph wires to keep all the while informed where trains are, and to direct their movements from hour to hour. We have presented to us in this case, then, general regulations well calculated to insure safety in the running of the trains; a usage well understood, and provided for in these general regulations, to vary some particulars of these general rules on special occasions by special orders; specific, well-devised and promulgated rules for the mode of doing so with safety; an occasion arising for the giving of a special order to these two trains; a complete observance of all these regulations by an officer who was in the stead of the defendant; an assurance to him that they had been observed by others; and the use by him, to bring his special order to the mind of the agents in charge of the trains, of the customary means that had been safe and efficient for a series of years. We need not say that there was no fault in the higher officers of the defendant, for it is the law of the case, given to the jury by the trial court, that there was not. The personal failure of duty was in the telegraph operator and the conductor.

Each of those agents, in doing his ordinary work for the defendant, was a fellow-servant of the intestate, in the same common employment. The conductor was engaged in the particular work in which the intestate was — that of moving trains. The telegrapher was engaged in a work closely connected therewith — that of receiving and giving information of the whereabouts of trains and communicating orders to those controlling them for stopping or going on. This was a branch of the general business of the defendant essential to the smooth and successful movement of the whole — that branch of it in which the intestate was engaged as much as any other. No question seems to have been made on the trial but that the operator and conductor were competent and skillful when the defendant took them into his employ. It cannot be contended that there was any thing required of the conductor that raised him out of his relation to the intestate of a fellow-servant. The act

required of the conductor, at the particular time, was to receive an order from an authorized source of command, and in a prescribed mode to acknowledge the receipt of it, and then to follow the direction. This was service merely. It is contended that the duty of the telegrapher at the time and the act required of him were those that the defendant was bound to perform as master, and that the negligent performance by the operator was the negligence of the master.

The argument to sustain this position consists, in part, in an effort to show that the duties of the operator were in no respect like to those of the intestate. They were not like, but they tended to the same end — that of the speedy, efficient and successful carriage of passengers and freight over the railway. There are many kinds of servants of a great railway company. Their duties are not in all cases the same, nor always like, yet they are all done to bring one result, and it is their conjoint simultaneous and harmonious performance that does effect the finality, sought through the whole complex organism. If it be so that this operator sometimes received and sent messages that had naught to do therewith, still, on this occasion, the act required of him had direct connection with the acts of those engaged in moving the two trains. The position, that the operator was hired and discharged by one superior agent, and the intestate by another, and that therefore they were not fellow-servants, is not sound. The general authority to hire and to turn away was in the defendant. It did radiate from him through different chiefs of department in his general work. His however was the ultimate power. The heads of bureaus were not independent contractors, doing a branch of his work on their own responsibility, and free from his interference with their subordinates. He had the right to step into their spheres of duty and act for himself.

There is more plausibility in the position, that the act that was to be done on this occasion was so essentially one for the master to do in his duty to his servants, that whatever subordinate was taken by him to do it came to be the master in doing it. It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it; that when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to perform it; that it is

the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants who are to square their actions to it ; that the same is his duty and act as to a variation from it, which is but a special time-table ; and that therefore whomever he uses to bring those time-tables to the notice of his servants, he puts that person in his place to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it is done and done effectually ; and that if instead of doing it in person, he chooses to do it through an agent, that agent, *pro hac vice*, is he, the master, and he, the master, is responsible for a negligent act therein of that agent whereby a fellow-servant of him is harmed. The rule has been laid down in repeated cases in this court, in terms so broad as to come close to this case. *Flike v. Boston & A. R. R. Co.*, 53 N. Y. 549 ; s. c., 13 Am. Rep. 545 ; *Fuller v. Jewett*, 80 N. Y. 46 ; s. c., 36 Am. Rep. 575 ; *Crispin v. Babbitt*, 81 N. Y. 516 ; s. c., 37 Am. Rep. 521. Attentive consideration however will perceive a distinction between the cases. That the master has the right as regards his servants to vary from the time-table that he has set cannot be doubted. It is at times a necessity so to do, and a necessity so frequent as to fall within the occurrences that a railway servant is bound to expect in the course of his employment. Even as regards the public and passenger, a railway manager has a right, when needs press, to vary from his general time-table. All that can then be required from him by the public and passengers is that when he makes the variation he act under it with reasonable care and diligence. *Sears v. East. R. R. Co.*, 14 Allen, 433 ; *Gordon v. M. & L. R. R. Co.*, 52 N. H. 596 ; s. c., 13 Am. Rep. 97. That is to say, due care and diligence in giving notice of the change and in running the train upon the changed time. A servant cannot ask for or expect more than this. In *Rose v. Boston & Albany R. R. Co.*, 58 N. Y. 217, while recognizing the rule as laid down in *Flike's* case *supra*, it was said : " It may be conceded that it is the duty of railroad corporations to prescribe, either by means of time-tables or by other suitable means, regulations for running their trains with a view to their safety ; but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains ; such obedience is matter of executive detail, which, in the nature of things, no corporation or any general agent of it can personally oversee, and as to which employees must be relied upon." These

views seem applicable to this case. The argument for the plaintiffs' position, as we have stated it above, breaks just at the part where to be successful it ought to be the strongest. It is not true, that on an occasion like this it is the duty of the master, or part of his contract, to see to it, as with a personal sight and touch, that notice of a temporary and special interference with a general time-table comes to the intelligent apprehension of all those whom it is to govern in the running of approaching trains. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped and started by telegraphic orders from distant points, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. Such a variation and the giving notice of it is not like the supply of suitable and safe machinery, or of competent and skilled fellow-workmen. It is the act of an hour or of an instant, which for any useful effect to be got from it must be done at the instant, and that too from a distance. It is from its nature and need looked for as such. Of necessity it must be done through the best means of communication that experience, the safe and successful use of years, has demonstrated it to be prudent to employ. The act of supplying machinery or fellow-servants is one for which time may be taken and deliberation had, and it may be learned before hazard is run whether the effort at supply has been well made and is sufficient. So in *Flike's* case, *supra*, it was easy to know before the train was started that the brakeman detailed for duty had failed to be at his place. And in *Fuller's* case, *supra*, that the engine sent to the shop for repairs was still faulty, before it was put on the road again. Hence it was not one of the risks of the service that the fireman, in one of those cases, and the engineer in the other, took upon himself that the brakeman did oversleep, or that the boiler did explode. From the nature of things, communication, on these special occasions of which we are speaking, must be had through intermediate agents, with no or but little opportunity of testing their immediate fidelity or accuracy. Would it do to lay down a rule, that when the master has chosen those agents with due care and diligence as to their skill

and competency, he must further take the responsibility to his other servants that the agents thus selected will never lapse into carelessness? The alternative is that he must in person put into the hands of each conductor and each engine-driver the general time-table, and every deviation from it, or abandon the mode of supervising and directing the movement of his trains by means of telegraphic communication. The reasonable rule in such case hath this extent, and no more, that he must first choose his agents with due care for their possession of skill and competency, and that then he must use the best means of communication according to prescribed general rules and regulations devised from the best experience in such business, and if among those means is the service of a fellow-servant, competent for his place, his possible carelessness is a risk of the employment that his fellows take when entering into the service. The liability of the master to his servant arises from his duty to him or his contract with him. Expressed in general terms, that duty or contract is to supply the servant with suitable and safe machinery and appliances, with competent and skillful co workers, and to make and promulgate sufficient rules and regulations for the conduct of the business in its ordinary run and for any extraordinary occasions that may be reasonably anticipated. It is not seriously contested but that all these things were done by the defendant. We think that it is a misconception of the case, to hold that the order of the train-dispatcher was a change of the rules of the road, as established and promulgated by the superintendent. The train-dispatcher acted in exact accord with the general rules and regulations which foresaw and with minuteness provided for such an occasion as this, as much and as fully, so far as we can see from the case, as for the ordinary running of trains on the general time-card. The order of the train-dispatcher was but a carrying out of those rules, and an application of certain provisions of them to a case for which they were made, and the arising of which had been foreseen as probable. In what other way could they be carried out in the detail of them, but through the service of servants previously chosen and assigned to their parts? And can it with propriety be said that the parts of that detail are acts of the master, that he must do himself or be liable for their negligent doing? The liability of the master is then made to depend upon the character of the act in the performance or non-performance of which the injury arises. If the act is one pertaining to the duty which the master owes to

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his servants, he is responsible to them for the manner of the performance of it. If it is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for the improper performance of it. *Crispin v. Babbitt, supra.* The query then is, in the case before us, is it the duty of the master to give personal notice to every operative of a train of a special deviation from an established general time-table, or is his duty done when he has beforehand provided rules, minute, explicit and efficient, and made them known to his servants, which if observed and followed by all concerned, will bring such personal notice to every one entitled to it? We think that in the circumstances of this case the latter clause of the query propounds the true rule, and should be answered affirmatively. It is the duty of the master to provide rules and regulations for the running of the trains. He has done so here. One of them is that by telegraphic message, sent at any time through operators at the ends of the wires, to the conductor and engineer of a train, that train may be stopped at a station, or hurried forward to another, or made to go out of general order. These rules with that provision are made known to all servants. If when the intestate entered the employment of the defendant, these rules had been read to him and his especial attention called to this one, and he had agreed to serve under it, would not he have taken the risk of the carelessness of the operators and conductors in carrying it out? Is this case any different in substance from that? Really by entering the employment with these rules in force, he did in effect agree that special orders might be so sent. The bargain between him and the defendant was not only that special orders might be given interfering with the general time-table, but that they might be given in this way. It is this feature of the case that distinguished it from some of those that we have cited.

The case was not given to the jury on this theory. It was, in the words of the learned counsel for the plaintiff, submitted to them on the theory that "the act of the operator was the act of the master."

This we think was an error that calls for a reversal of the judgment and a new trial.

Judgment reversed.

All concur except DANFORTH and FINCH, JJ., dissenting.

GREENFIELD V. PEOPLE

(85 N. Y. 75.)

Criminal evidence — testimony of non-expert as to blood stains — indifference of prisoner — confessions of third persons.

A non-expert witness is competent to testify that certain stains were blood. Where a person is accused of having murdered his wife, it is competent to show that he shed no tears and exhibited indifference immediately after the homicide.

On a trial for murder, a letter written by another to a third, containing expressions possibly capable of being construed as confession that the writer committed the murder, is incompetent as evidence for the prisoner ; and so of like conversation overheard between other persons, not constituting any part of the *res gestæ*, and not distinctly purporting to be connected with the crime in question. (See note, p. 644.)

CONVICTION of murder. The opinion states the facts.

S. C. Huntington, for plaintiff in error.

W. C. Ruger and *B. F. Chase*, for defendant in error.

MILLER, J. The writ of error in this case brings up for review a judgment upon the conviction of the prisoner for the crime of murder in the first degree, in killing his wife, at a Court of Oyer and Terminer held in the county of Onondaga, the place of trial having been changed to this county from the county of Oswego, where the offense was committed. There was no positive proof that the prisoner committed the offense, but the testimony established facts and circumstances which tended strongly to prove his guilt, and called upon the jury to determine the weight which should be given to the evidence adduced upon the trial. It appeared that the prisoner and his wife had been married about four years, and their matrimonial life had been marred by jarring discords and quarrels and characterized by violence and cruelty of Greenfield toward his wife. She had threatened to leave him, in consequence of his bad conduct, and he had an interview with her about twelve o'clock of the night of the murder in relation to that subject at his own house. He then, as he testified, proceeded from there to his father's residence and went to bed, which was unusual and contrary to his

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accustomed habit. He swore also that he saw a light in his house during the night, dressed himself and proceeded to the house, which was some twenty-one and a half rods distance from his father's, looked into the window, and saw a man by the name of Hinds with a lamp there. Immediately he returned to his father's, called him up, and also an uncle who lived in the neighborhood, told what he had seen and all of them together went to the house of the prisoner. The light in the meantime had disappeared, and upon entering the house the deceased was found dead. There were indications of a severe blow from a piece of board which was apparently broken from the force used, from the eye-brows to the hair of the deceased, and her throat was cut from ear to ear, severing the artery, jugular vein and the nerves, and blood was on the wall and a quantity upon the floor. A knife of the prisoner was found on a shelf in the pantry which had blood upon it which was not yet dry. An army overcoat, which it was proven he had worn on that night, was not found, and there were other circumstances, which tended to establish that he was the offender, not necessary to be stated.

The questions raised upon the trial related to the rulings of the judge as to the testimony and the instructions given by him to the jury, and these will be duly considered. First. Upon the trial a witness — one Stevens — was sworn and testified that about ten o'clock on the forenoon of the day of the murder, about one-half way distant from the defendant's house to the road leading past and near and about two rods west from the defendant's house, he saw a spatter or spot on a flat stone in the path, which stone was from three to five inches across ; that there were a few drops or spatters from the size of a hay-seed to a kernel of wheat, of a darkish red color; and that he was able to state what that substance was. The question was then put to him as follows: "State what that substance on the stone was?" This was objected to as irrelevant and incompetent, and upon the ground that the witness is not competent to express an opinion as to whether it was blood or not, and was not an expert. The witness was then informed by the court, before he was allowed to answer, that his opinion or judgment was not requested ; but if he answered he could only be allowed to answer as a fact what the substance was. He stated that he could so answer, and the court held that he might answer, but that his opinion should not be taken. The witness answered that he could swear as a matter of fact what it was, and an exception was taken to the ruling of the

court by the prisoner's counsel. The witness also answered, the spots were blood, and further testified that he saw stains or spots on the handle, also on the platform of the pump, about two rods in front of the dwelling-house of Richard Greenfield, the father of the prisoner, about the same time. Other questions were put of a similar character as to the last stains and the same objections urged; and the same ruling had, exception taken and evidence given. Upon his cross-examination the witness testified that his business was working on a farm and trapping pigeons, that he was not a chemist, and had no experience in examining blood stains. Evidence of a similar character was also offered and given by one Pennock, who testified that he was a farmer, had no practical experience as to blood stains on wood, iron or hemlock plank; that he had butchered a good deal and hunted and caught pigeons, and the same objection was made, ruling had and exception taken by the prisoner's counsel. It also appeared from the evidence that the prisoner, in going from his house to his father's, would pass over or near the places where the alleged blood stains were found.

The defendant's counsel insists first, that he was not legally bound to account for the stains of blood, and that in the absence of proof that he caused them, they neither proved nor tended to prove his guilt; second, that a person who is not an expert cannot be allowed to testify as to a matter of fact whether the stains described were blood. As to the first ground, we think that the fact, that blood stains were found along the road and in the course of the route over which the prisoner would have been obliged to, and most probably would have passed on his way to his father's house, was a circumstance which tended to prove the issue and constituted an important link in the chain of evidence to establish his guilt. There was blood in the house, and that it was found elsewhere in the vicinity where he may have been, evinced, with the disappearance of the coat which he wore, that it may have dripped from this garment or some part of his person. There is no rule of evidence which excludes such proof where the circumstances tend to establish guilt. In regard to the second ground, we think that the witnesses were competent to testify upon the subject whether the spots described were blood, without deciding the question whether an opinion of the witnesses would have been competent. Under the circumstances it is sufficient to say that the testimony was only received after the witnesses had shown some knowledge on the subject

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as a matter of fact. The question was not whether it was human blood, and no objection was taken on this ground, but what the character of the substance was. It is not difficult to perceive that there are many substances which are commonly known, in regard to which a witness may testify although he is unacquainted with their ingredients or chemical properties. Many of these would be more familiar to those who had occasion to notice them frequently than to others, and hence they could testify more directly and positively in regard to the same. But to hold that no one but an expert or a scientific person should be allowed to speak on such subjects would be establishing a stricter rule than is authorized by law. While then inexperienced persons and those comparatively ignorant may be able to testify in reference to such substances, the weight to be given to their evidence must of course depend upon the circumstances and their knowledge of the matter. The existence of blood in large quantities, and where the stains are recent and marked, may be distinguished by most persons ; and while it is more difficult to discover the character of a few drops or a smaller quantity, it does not necessarily follow that those who from experience and observation have become familiar with the appearance of blood cannot testify to its reality as a matter of fact. We have given due consideration to the able argument of the prisoner's counsel to the effect that uneducated and ignorant men are incompetent to testify under the circumstances, and that it is alone within the province of experienced and scientific experts to give evidence on the subject ; but we are after careful investigation brought to the conclusion that in many instances the ordinary mind may be able to determine from observation and experience the character of such stains ; and in this case the witnesses who testified had sufficient knowledge to speak on the subject. The line is often a close one between a matter of fact and an opinion, but we are of the opinion that the witnesses sworn were competent to prove the existence of blood as a matter of fact. Nor are we without authority upon the question. In *People v. Gonzalez*, 35 N. Y. 49, it was held that stains of blood upon the person and clothing worn by the accused on the night of the murder may be shown by persons who are no experts, and matters of common observation may ordinarily be proved by those who witness them, without resorting to scientific or mechanical tests to verify them with definite precision. It is said in the opinion by PORTER, J.: "The testimony of the chemist who has analyzed

blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and though the one may be entitled to much greater weight than the other, with the jury, the exclusion of either would be illegal." In the case last cited testimony had been given to the effect that blood was on the clothes of the prisoner, and we think it must be regarded as an authority in point. See also *Com. v. Sturtivant*, 117 Mass. 122, 132; s. c., 19 Am. Rep. 401; *People v. Eastwood*, 14 N. Y. 562. The cases cited by the counsel for the prisoner have been carefully examined, and none of them establish the principle that the evidence introduced was incompetent. The conclusion therefore is a rational one, that in matters of common observation, where persons have special opportunity to learn from the nature of their avocations or otherwise, although not strictly experts, their conclusions as to a fact is admissible, the weight to be given to the evidence being governed by the circumstances, and by the experience and knowledge of the witness as to the subject-matter of the inquiry.

Second. Upon the trial evidence was adduced to show the prisoner's conduct on the morning after the homicide, and a number of witnesses were asked whether they saw him shed tears, and answered that they did not. Objection was duly taken to the testimony, which was overruled, and the prisoner's counsel excepted to the decision. One witness swore that he did see him weep on that day, and there was evidence showing that upon its being said to him by one of the witnesses that it was a sad affair which had occurred at his house, he replied, "Yes, I had a load of oats stolen." Another witness testified that he appeared to be indifferent as to his wife's death. The object of the testimony objected to evidently was to establish that the prisoner did not manifest that degree of feeling and sensibility which was usual on such occasions, and that he was not especially moved or affected by his wife's death. The acts and conduct of a party at or about the time when he is charged to have committed a crime are always received as evidence of a guilty mind, and while in weighing such evidence ordinary caution is required, such inferences are to be drawn from them as experience indicates are warranted. (Roscoe's Cr. Ev. 21, 22.) And the demeanor of a prisoner at the time of his arrest, or soon after the commission of the crime, or upon being charged with the offense, is a proper subject of consideration in determining the question of guilt. Such indications however are by no means conclusive, and must depend greatly

upon the mental characteristics of the individual. Innocent persons, appalled by the enormity of a charge of crime, will sometimes exhibit great weakness and terror, and those who have been crushed with the weight of a great sorrow will manifest the greatest composure and serenity in their grief, and meet it without the shedding of a tear. While the manifestations at such a time sometimes indicate excitement and great disturbance of the physical system, and do not always sanction an inference of guilt, they are admissible evidence for the jury to pass upon, in view of the circumstances. *Lindsay v. People*, 63 N. Y. 143. The conduct of a prisoner under such a trying ordeal is to be weighed by the jury, and it is for them to determine whether it is contrary to the ordinary behavior of a person charged with crime, or to be attributed to his mental characteristics, or evinces guilt or innocence. Under well-established rules the evidence objected to was competent for what it was worth, and there was no error upon the trial in its admission.

Third. There was, we think, no error in excluding the letter proved to have been written by Royal Kellogg to his brother. The letter, among other things, contained the following language: "Tell me all about the murder. If you think it all right, tell them I am in Lafayette, and if they want me they can come and get me." Even if this letter could be regarded as a confession of Kellogg that he committed the murder, it was only the declaration of a third party, merely hearsay testimony, and upon no rule of evidence admissible. If such declarations were competent upon any trial for homicide, they would tend clearly to confuse the jury and to divert their attention from the real issue. The letter did not tend to establish that Kellogg committed the offense, was not a part of the *res gestæ*, and in no sense relieved the prisoner from the charge for which he was upon trial, or raised any presumption that Kellogg was the guilty party. Confessions of this character are sometimes made to screen offenders, and no rule is better established than that extra-judicial statements of third persons are inadmissible. Whart. on Ev., § 644; Whart. Cr. Law, §§ 662, 684; 2 Best on Ev., §§ 559, 560, 563, 565, 578. For similar reasons the anonymous letter directed to the sheriff, in which confession was made of the murder, was properly excluded.

In connection with the questions last considered and under the same general head, the learned counsel for the prisoner claims that there was error in the exclusion of the declarations of John Taplin

to Alden and Royal Kellogg offered to be shown upon the trial by one Wyman. The witness had testified that he stayed at the house of Taplin, who was his son-in-law, on the night of the murder, which was three-fourths of a mile from the prisoner's house. He was awakened by the barking of a dog about four o'clock in the morning. He got up, looked out of the window, saw three men who had a bottle, out of which they drank. They were Taplin and the two Kelloggs. They had a double-barrel gun and a bag with something in it. One went to the pump and washed his hands. Alden Kellogg had the gun and Taplin the bag. Taplin got a coat and put it on, took off his coat, went and got a coat from the horse barn, which Royal Kellogg put on; one of the Kelloggs took away the gun and bag. Taplin went into his house. The prisoner's counsel offered to prove that Taplin said to the Kelloggs on that occasion before they left: "You were damned fools to do it;" and one of the Kelloggs replied: "If we had not done it we should all have been hung." This was objected to, the testimony excluded and an exception taken. There was no other testimony which in any way tended to connect the Kellogs or Taplin with the events of that night. On the contrary, the probability of such a theory was rebutted by the version of the prisoner that he saw Hinds in his house just preceding the homicide, by proof that the Kelloggs were in bed at the time all night, and the testimony of several witnesses to the effect that Taplin and his family were then visiting his father some twenty-seven miles from his residence, and did not return until the day after the murder, although there was much conflict in the testimony as to the last-named fact. It should also be stated in this connection that Royal and Alden Kellogg were both in court during the time when the evidence for the prosecution and defense was given, and neither of them was called as a witness. The testimony however on this branch of the case, so far as it was contradictory, was a matter for the consideration of the jury, and the question arises whether the evidence had any bearing upon the issue upon trial. It is claimed that it was admissible, inasmuch as it tended to raise a presumption that the Kelloggs and Taplin were the murderers, and as a part of the *res gestæ*, in connection with the letters which have been already considered. Wharton in his work on Criminal Evidence, § 262, says: "*Res gestæ* are events speaking for themselves through the instinctive words and acts of participants * * * when narrating the events;

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what is done or said by participants under the immediate spur of a transaction becomes thus part of the transaction because it is then the transaction that thus speaks." The rule no doubt is that to constitute declarations a part of the *res gestæ*, they must be made at the time when the act was done to which they relate and which they are considered as characterizing, and must so harmonize as to be obviously a part of the transaction. *Moore v. Meacham*, 10 N. Y. 210 ; *Enos v. Tuttle*, 3 Conn. 250 ; *Rockwell v. Taylor*, 41 id. 56. Nor must they be narratives of past occurrences, but concomitant with the principal act, and so connected with it as to be regarded as the result and consequence, or as a part of the act itself, and presumed to have been induced by the motive which led to its commission. 1 Greenl. Ev., § 110 ; *People v. Davis*, 56 N. Y. 95 ; *Luby v. H. R. R. Co.*, 17 id. 131 ; *Ins. Co. v. Mosley*, 8 Wall. 405. As was said in the last case cited, they must be contemporaneous with the main fact to which they relate. In fact they must directly relate to the transaction, or be proved as so intimately connected with it and near to it in point of time, that it is manifest that they emanate from and constitute a component part of the same. Having these rules in view, it is not apparent that the declarations offered to be proved were identified with and constituted a part of the homicide. The murder occurred between the hours of one and three o'clock, some distance from the place where the alleged declarations were made. There is no proof that the Kelloggs or Taplin were there, and on the contrary, as we have seen, the testimony of the prisoner was to the effect that Hinds, and not the Kelloggs or Taplin, were in the house at the time. Nor was it proved that either the bag or gun was taken from the prisoner's house, or that the persons named had any motive for the commission of the crime or any complicity with the murder, and there was no circumstance in the case from which the jury might draw the inference that they had. Aside from the fact that the Kelloggs and Taplin were not otherwise implicated, the declarations offered to be proved would not tend to prove their guilt of the homicide. The statement offered was that they would be hung if they had not done it, while on the contrary they were liable to this penalty if they had killed Mrs. Greenfield. It would not therefore be proof that they had committed this offense, nor was it a direct or implied admission that they had. Such evidence can in no sense, we think, be regarded as a part of the *res gestæ*. While evidence tending to

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show that another party might have committed the crime would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances, as tend clearly to point out some one besides the prisoner as the guilty party. Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose. In considering the question, we have carefully examined the numerous authorities cited to sustain the position that the evidence was competent, and none of them hold that under such circumstances it could lawfully be received, and it was neither admissible alone nor in connection with the letters referred to.

[Omitting an unimportant matter.]

Judgment affirmed.

All concur.

NOTE BY THE REPORTER. — The doctrine of the last head note has recently been laid down in *Daniel v. State*, 65 Ga. 199, an indictment for larceny. The court said:

"The rule is too well settled to be disturbed, that the possession of stolen property, immediately after it is stolen, puts upon the possessor the burden of proving that his was not a guilty possession. These witnesses were therefore offered to remove this legal presumption of the defendant's guilt, by showing that they had heard one Dixon say that he had stolen the steers. We are at a loss to see how under any well defined or even loose principle of law this testimony was admissible. To allow such hearsay as this to rebut and overcome so strong a legal presumption of guilt would be about equivalent to holding that if the prisoner could get some one to say that he committed the crime for which the accused was indicted, and then offer witnesses to prove that they heard it said, then in all such cases it would be the duty of the jury to acquit. No court within our reading has so held, and this will certainly not be the first to establish such a precedent."

HERRMAN V. ADRIATIC FIRE INSURANCE COMPANY.

(85 N. Y. 162.)

Insurance — fire — "vacant or unoccupied."

A fire policy insured a dwelling-house, occupied to the knowledge of the insurer only as a summer residence, with its outbuildings and a farm-house, barn, etc., all on the same farm, together with the furniture and personal property in the same, with a condition that the policy should be void if "the above-mentioned premises become vacant or unoccupied, and so remain for more than thirty days," without consent. At the issuing of the policy, the plaintiff was living in the dwelling-house, but he left it in November, with the furniture, in charge of his farmer, who occupied the farm-house. The

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farmer's family aired the dwelling-house weekly, and the plaintiff and his wife visited it once a fortnight. The next April the dwelling-house and some of its outbuildings were burned. No consent had been obtained. *Held*, that the insurance was forfeited.*

ACTION on a policy of fire insurance. The head note and opinion state the facts. The defendant had a verdict, which was set aside at General Term.

James Thomson, for appellant.

N. B. Hoxie, for respondent.

FOLGER, C. J. This is an action on a policy of fire insurance. The property insured consisted of different buildings and different kinds of chattel property kept in those buildings, respectively. The different properties insured and the different amounts put at risk are each specifically named in the policy with much minuteness. The property destroyed and for the loss of which the action is brought was but parts of the whole at risk, being the dwelling-house, and most of the contents of it, and four outbuildings, essential or convenient for use with the dwelling.

The question in agitation at the Trial Term and at the General Term was, whether the policy was avoided by a breach of the condition, that if the premises should become vacant or unoccupied, and so remain for more than thirty days without notice to and consent of the defendant, in writing, the policy should be void. The plaintiff contends that the two words "vacant" and "unoccupied" are synonyms, and are to be interpreted as having the same meaning, and that that meaning is empty. And then argues, that as the dwelling-house was not empty, there was no breach of the condition. There are doubtless conditions of a dwelling-house, or other like structure, when either word applied to it, or both words applied to it, will express a like state of it. There are however states of it when that will not be the case. It is so, because the different things that are receptive of the epithets of vacant and unoccupied are different in their capability and susceptibility of being filled or occupied. Some cannot have one of those terms applicable to them, without the other at the same time being also applicable. Some, from the nature of the use which goes with the occupation of them,

* See *Stupetski v. Trans. Atlantic F. Ins. Co.* (43 Mich. 373), 38 Am. Rep. 196.

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may not be vacant, and yet they will, in any just use of the term as applicable to them, be unoccupied. A dwelling-house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it many kinds of chattel property are gathered in it. So that in the use of it it is a place of deposit of things inanimate and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case, with all inanimate things taken out, but with those animate still remaining in it, it would not be unoccupied, for it would still be used for shelter and repose. And it is because, in our experience of the purpose and use of a dwelling-house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it, that that word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the word "vacant," as applied to a dwelling, carries the notion that there is no dweller therein; and we should not be sure always to get or convey the idea of an empty house by the words "vacant dwelling" applied to it. But when the phrase "vacant or unoccupied" is applied to a dwelling-house, plainly there is a purpose — an attempt to give a different statement of the condition thereof; by the first word as an empty house, by the second word as one in which there is not habitually the presence of human beings. In the case of *Hermann v. Merchants' Insurance Company*, 81 N. Y. 184; s. c., 37 Am. Rep. 488, in this court in June last, the decision went, not on the ground that the two words were used to mean or that they meant the same condition of the building, but that by the use of the copulative conjunction with them, there was a contract framed of which there was no breach, unless the house was at the same time in the double state expressed by the phrase; that is, both vacant and unoccupied at the time of the fire, both empty and unused for abode.

It is clear from the testimony, that the dwelling-house insured by the defendant was not occupied as such at the time of the fire. The fortnightly visits of the plaintiff and his wife to it were not the occupation that is meant when a dwelling-house is spoken of. The weekly tours of inspection of the farmer and members of his family living on the grounds, and his supervision of it from his own house, were more useful, but they fell short of being occupation of it. The term "unoccupied," used in the policy, is entitled to a

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sense adapted to the occasion of its use, and the subject-matter to which it is applied. It does not need that we go into discussion of the good reasons for exacting the condition on taking a risk upon a dwelling-house. It is enough that the parties have come into that covenant. It is to have a meaning fitted to the circumstances in which it was made and to the subject to which it related. We have already said enough to show our opinion that for a dwelling-house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. We think that a verdict of a jury would not have been allowed to stand, that found that this dwelling-house was occupied at the time of the fire, within the terms of the policy. But it is said, that though this may be so in general, yet that the defendant made its contract with a view to just the state of things that existed with this property; that it was chargeable with a knowledge of the character and use of the premises, and that there would be a change of occupancy, such as in fact occurred. We cannot yield to that view. It may be that the defendant knew that it was but the place of summer abode for the plaintiff. Its contract was issued in the summer when the property was in strict occupancy, and it provided for the coming of the fall, when that occupancy would be abandoned or modified; for the policy was not void at once on a cessation of occupancy. That cessation must last for thirty days, and be unnotified to the defendants and continue thereafter without its consent. There was opportunity for the plaintiff to keep up that indemnity or to get other; and to the defendant to retain the risk, or to be freed from it, when that occupancy was about to cease, and notice was given.

Nor are we able, after much consideration, to agree with the learned General Term on the ground upon which it put its judgment. The condition of the policy is: "Or if the above-mentioned premises shall * * * become vacant or unoccupied * * * this policy shall be void." As we have above said, there were several different kinds and pieces of property insured, and as was indicated by the description of them, the whole making up a well-to-do proprietor's rural establishment. The understanding must have been that there was comprised in the whole the buildings on a farm or country seat and the chattel property usually kept at such a place. The contention is that the words "above-mentioned premises" are

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collective and apply to all the property described, and the intent of the condition is that if all of it should be left unoccupied, then the policy should be void ; but that one or several, or many of the buildings might be unoccupied, yet if the rest were occupied, the condition of the policy would be saved. To give this construction to the phrase in question, it would need to carry it through all the conditions in the policy, to manifest absurdity and to an inconvenient precedent. There is a condition against other insurance, "on the property hereby insured." If the plaintiff had over-insured his dwelling-house, would not the condition have been broken as to that, though he had not increased that on his kitchen detached ? There is a condition against a change of title of the property. If the plaintiff had sold off so many acres as would include the farmhouse, would he have retained his insurance on that building because he had not transferred the whole premises ? The plaintiff grasps at a two-edged sword, when he seeks to make such application of those general words of the policy. He contends that when words are used in the policy referring back to the property described, they mean to include the whole property. This would be to make the contract of insurance entire and indivisible ; and to affect all the property insured with any act of the insured, which as to any item thereof, worked a breach of any condition. This is not the true, just or equitable construction. The clause is to be used distributively, and to be applied to each singular of the previous description of the property, as the kind of that property and the nature of the use of it may demand. It was upon this principle that we grounded our decision in *Merrill v. Agr. Ins. Co.*, 73 N. Y. 452 ; s. c., 29 Am. Rep. 184. There we said : "Though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of the condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that be held to be avoided, and as to the other subjects held valid." This was the converse of the proposition that we are now maintaining.

The case of *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605, is not parallel with this.

Therefore though the farm premises and some of the buildings thereon were in actual human occupation, that use of them did not extend to and take in the dwellings burned, so as to keep good the condition of the policy. It is further claimed that it was er-

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roneous for the trial court to direct a verdict for the defendant, because all of the property burned was not unoccupied. Besides the dwelling-house, there was lost a wash-house, a wood-house, a kitchen and a privy. It is contended that there was no evidence that these were unoccupied. The reasoning is ingenious, but it is not convincing. It is said that it does not appear that the occupation of these structures was confined to the plaintiff or the members of his immediate family as it was made up when he dwelt upon the place, and that it might be that the farmer and the members of his family might have used and occupied them. Now these out-buildings were appurtenant to the dwelling-house; the use of them was concurrent with the use of the dwelling-house; they were parts of the one domestic establishment, and separated but forty feet from the main building. It is too plain for denial, save as a *dernier resort*, that the occupancy of them, in habitual, continuous use, for the purposes for which they were built and to which they were put, began when that of the dwelling-house began, and ended when that ended.

The plaintiff and the defendant made their contract in such terms as it pleased them both. It may or may not be a strict and rigorous application to the facts of the case of the condition that we have been considering; but we cannot, consistently with lasting principles of construction and interpretation, hold otherwise than that the plaintiff made a breach of a binding condition, and must abide the unfortunate consequence.

The order of the General Term should be reversed, and judgment absolute rendered in favor of defendant upon the verdict, with costs.

Order reversed and judgment accordingly.

All concur, except MILLER, J., not voting.

DONOVAN V. MCALPIN.

(83 N. Y. 185.)

Officer — public — liability for negligence — school trustees and superintendent.

The plaintiff, a scholar in a public school in the city of New York, was injured by falling into an excavation carelessly left open in the school yard by workmen in repairing the school building. The repairs had been ordered

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by the school trustees of the ward, who acted gratuitously, and were under the direction of the superintendent of school buildings. No personal negligence was shown in any of the defendants. *Held*, that neither the trustees nor the superintendent were liable.

ACTION of damages for personal injury by negligence. The head note and opinion show the facts. The defendant had judgment below.

Edward P. Wilder, for appellant.

D. J. Dean, for respondents.

ANDREWS, J. This action is brought to recover for the same injury for which the action was brought by the plaintiff against the Board of Education of the city of New York, just decided.* The defendant Stagg was superintendent of school buildings under the appointment of the board, and the other defendants were ward trustees of schools in the ward where the school premises were located, in which the excavation was into which the plaintiff fell.

The alleged negligence was the leaving of this excavation uncovered and unprotected. The general facts, and the provisions of the statutes defining the power and duties of the board of education, and of the ward trustees in respect to the care and custody of school buildings and premises are stated in the opinion in the former case.

The defendant Stagg was appointed superintendent of school buildings pursuant to subdivision two of section two, chapter 101 of the Laws of 1854, which authorizes the board of education to appoint a superintendent of school buildings, and to regulate and determine his powers and duties except as otherwise provided by the act. By the rules of the board it was made his duty to examine all buildings under the control of the board in reference to their safety and general condition as to repairs, and to superintend all work done, in connection therewith. It was not claimed on the trial that there was any personal negligence on the part of any of the defendants, or that they had any knowledge that the workmen who were engaged in repairing the building had removed the grating which covered the excavation; but it was assumed by both parties that there was no personal negligence on the part of the

* 85 N. Y. 117.

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defendants, and that the actual negligence was that of the workmen employed by the ward trustees to make the repairs.

Upon this state of facts we think the complaint was properly dismissed. The trustees, in directing the repairs to be made, and in employing workmen for that purpose were acting within the scope of their authority. They were charged with the safe-keeping of the school property in their ward, and authorized to make needful repairs within certain limits. The employment of workmen for this purpose was necessary, and if they employed competent men, and exercised reasonable supervision over the work, their whole duty as public officers was discharged. They were acting as gratuitous agents of the public, and it could not be expected that they should be personally present at all times during the progress of the work, to supervise the conduct of the workmen. It was said by BEST, C. J., in *Hall v. Smith*, 2 Bing. 156, that no action can be maintained against a man acting gratuitously for the public for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with care and attention, and that such a person is not answerable for the negligent execution of an order properly given; and it was said by NELSON, C. J., in *Bailey v. Mayor*, 3 Hill, 538, that if a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ.

In this case it must be assumed that the defendants were not chargeable with personal negligence, and they omitted no duty imposed upon them by law. It would be equally opposed to justice and sound public policy to make them answerable for the negligence of the workmen. They were acting as public officers, and in respect to the acts of persons necessarily employed by them the doctrine of *respondeat superior* has no application. Story on Agency, § 321.

The judgment should be affirmed.

Judgment affirmed.

All concur.

SUSQUEHANNA VALLEY BANK v. LOOMIS.

(85 N. Y. 207.)

Negotiable instrument — accommodation indorser — forgery — guaranty.

A stranger presented to the plaintiff bank a draft drawn by a New Jersey bank upon a New York bank, which had been fraudulently altered by raising the amount and changing the date and the name of the payee. The defendant's testator came with the stranger, and put his name on the draft as an indorser, for accommodation, to the plaintiff's knowledge. The plaintiff thereupon purchased the draft from the stranger. The draft was paid by the drawee, but the money was refunded on discovery of the forgery. In an action on the indorsement, *held*, that he could not be presumed to have known of the forgery; and that he was not liable without demand, refusal, and notice of non-payment.

ACTION on an indorsement of a draft. The opinion states the facts. The plaintiff had judgment at trial, which was reversed at General Term.

O. W. Chapman, for appellant.

S. C. Midland, for respondent.

DANFORTH, J. The issues were tried by a judge without a jury, and exceptions to his conclusions of law permit the inquiry whether the facts found will support the judgment.

It appears that on the 5th day of June, 1877, the First National Bank of Plainfield, N. J., made and issued its draft upon the First National Bank of New York, for \$25, payable to the order of William A. Palmer, but prior to the 12th day of June, 1877, it was so altered by some unknown person that when on that day a stranger brought it to the plaintiff's banking house, it bore date the 6th day of June, 1877, instead of the 5th, was for \$1,200, instead of \$25, payable to the order of William Brown instead of William A. Palmer, and upon it was indorsed the name of William Brown. The defendant's testator was then with the stranger and the latter asked for money on the draft. The plaintiff purchased it and paid the money to him. The defendant's signature was then on the draft as an indorser, but the money was not paid until after the defendant left the bank. From the order in which these events are stated

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by the trial judge and the particularity of detail, it may be fairly inferred that the indorsement by defendant was at the bank and intermediate the application and the purchase. This inference is strengthened by the fact that such indorsement does not appear upon the copy-draft set out in words and figures in the report and representing, as is found, its true condition when taken to the bank and offered to its cashier. Thus plaintiff's case against Pickering rests solely on the draft and his indorsement, aided by no finding of collateral circumstances. That such existed, we might imply from the allegations in either pleading ; but as to them no finding was made, nor, so far as the case shows, was any evidence given in their support. It is found moreover that he put his name upon the draft as "an indorser." He is bound then by no other obligation than is implied by law from that relation. It is obvious that he was an accommodation indorser, and it is not pretended that he received any portion of the avails of the draft. What then was his engagement ? As indorser it was in general terms to pay the draft to any holder for value whose title was derived through the payee, provided it was duly presented to the drawee, payment refused by it and due notice of non-payment given to him. *Hall v. Newcomb*, 7 Hill, 416 ; *Spies v. Gilmore*, 1 Comst. 321.

It is clear that the judgment of the Special Term cannot stand upon the performance of any of these conditions. The draft was sent by the plaintiff to its correspondent, The National City Bank, for collection, and after the usual course through the clearing-house, was paid to it by drawee. It is contended by the defendant that the obligation of his testator was thus fulfilled. But on the other hand, it is urged, "that by indorsing the draft he guaranteed its genuineness in all its particulars, including the amount of money for which it called ;" and as the drawee afterward credited back to the Plainfield bank the money which it had charged, and the National bank repaid the money it received to the drawee, and the plaintiff to the National bank, that the testator as indorser is bound to pay to the plaintiff the money which it paid the stranger for the draft. It must be conceded that the Plainfield bank was at least entitled to have refunded to it the difference between the true sum for which the draft was issued and that to which the check had been altered ; and in like manner, that the plaintiff would be entitled to recover from the stranger to whom it was paid the same amount of money (*Hall v. Fuller*, 5 B. & C. 750 ; *Merchants' Bank of N. Y.*

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v. *Exchange Bank of N. O.*, 16 La. 457 ; *Turnbull v. Bowyer*, 40 N. Y. 456 ; *White v. Cont. Nat. Bk.*, 64 id. 316 ; s. c., 21 Am. Rep. 612) but it by no means follows that the principle by which this right is upheld applies to this case. *Hall v. Fuller*, *supra*, decided in 1826, shows that the fraud here practiced is not of modern invention. The action was assumpsit for money had and received by the defendant (bankers) to the use of the plaintiffs (merchants). It was shown that the plaintiffs' check of £3 upon the defendant had been fraudulently raised to £200 and otherwise altered, and when presented was paid and charged to plaintiffs. They sued to recover moneys deposited by them, and the bankers sought to retain for the amount so charged. It was contended by the plaintiffs that they were entitled to the whole sum of £200, but the court ruled otherwise, saying, "the bankers have paid more than the order authorized them to do, for by that they were authorized to pay no more than £3," and the judgment was limited to the excess. In *Merchants' Bk. v. Exchange Bk.*, *supra*, it appeared that the Bank of Mobile drew a draft of \$213.50 upon the plaintiffs, which was altered to \$5,013.50 and then sold to the defendant, the Exchange Bank of New Orleans, who sent it forward for collection. The plaintiffs paid it and passed the full amount to credit of defendants. When the forgery was discovered the plaintiffs sued to recover the difference between the true sum and that to which the check had been altered, and succeeded. In *White v. Continental Nat. Bk.*, *supra*, the defendant, as the holder of the bill, claimed to be entitled to receive the amount thereof from the drawees, and was held to a knowledge of his own title and the genuineness of the indorsements and of every part of the bill, "within," it was said by ALLEN, J., "the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument ;" adding also : "The presentation of the bill and the demand and receipt of money thereon was equivalent to an indorsement. The drawees had a right to act upon the presumptive ownership of the defendant as the apparent holder." There are other cases to the same effect. In *Graves v. American Exchange Bk.*, 17 N. Y. 205 the defendant sought to withhold a bill of exchange upon the ground of payment to the payee. The indorsement was a forgery, and it was held did not pass the title or justify its payment. *Morgan v. Bank of State of New York*, 11 N. Y. 404, in-

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volved substantially the same question. So in *Canal Bank v. Bank of Albany*, 1 Hill, 287, the defendant had received money upon the strength of a forged indorsement. None of these authorities apply to the case of an accommodation indorser who neither owned nor held the paper nor received the money sued for. In the case at bar the plaintiff knew that this was the position of the indorser; knew that he was not the holder of the paper; that he claimed no right to receive the money, and by the fact that the payee presented the bill with the defendant's name thereon as second indorser, was chargeable with notice that the defendant was an accommodation indorser. Nor were the facts upon which the plaintiff now seeks to recover within, or presumed to be within, the knowledge of the defendant and not of the plaintiff.

It remains to consider the case of *Turnbull v. Bowyer*, 40 N. Y. 456, cited by the appellant. There the names of persons to whom a check was payable were forged, and afterward it was innocently indorsed by the defendant. By his negligence it went into circulation, and reached the hands of one who, in good faith and without notice of the true relation of the indorser to the check, paid value for it, and was permitted to recover it back from him, upon the ground that the indorsement was a warranty, to every subsequent holder in good faith, that the instrument itself and all the signatures antecedent to such indorsement were genuine. It was decisive of that case that the payee's name was forged and the remark that the implied warranty applied to the instrument itself was uncalled for by any fact in the case. In support of the proposition reference is also made to Story on Promissory Notes, §§ 135, 379, 380, 387, and cases there referred to, and such is the citation by the appellant. But these merely assert a right of action against the indorser on the ground that he cannot complain if called upon to repay money received by him upon an indorsement of a void title, for the author says: "There is a failure of the consideration on which the transfer was made." In Daniels on Neg. Inst., language similar to that of Story is made use of (§ 669), but the cases cited in its support do not meet the facts of this case. They are like those before referred to, and only upheld the recovery of money from the person to whom it was paid. *Jones v. Ryde*, 5 Taunt. 486.

There are no doubt cases in which an indorser is liable without notice or non-payment. *Bickerdike v. Bollman*, 1 T. R. 405, is said

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by PARKE, B., in *Carter v. Flower*, 16 M. & W. 743, to have made the first exception to the general law which requires such notice. There the indorser knew the draft was not to be paid ; and another is illustrated in *Mechanics' Bank of N. Y. v. Griswold*, 7 Wend. 165, where the indorser had all the maker's property. But that any exception should be allowed has been many times regretted, because thereby nice distinctions were introduced into the law, and a plain and intelligible rule departed from. It has however been uniformly held, that whoever will avail himself of an exception to the general rule must bring his case within it, either by some recognized authority or the application of some legal principle. Such exceptions should not be multiplied. *Turnbull v. Bowyer, supra*, goes no further than to make an indorser liable upon an implied warranty that a prior indorsement, purporting to be that of the payee, was genuine ; and upon the same principle it has been held that a bank certifying a check in the usual form simply certifies to the genuineness of the signature of the drawer, and that he has funds sufficient to meet it. It does not warrant the genuineness of the body of the check as to payee or amount. This was decided in *Marine National Bank v. National City Bank*, 59 N. Y. 67 ; s. c., 17 Am. Rep. 305, where the plaintiff certified a check which had been altered by changing the date, name of payee and raising the amount, and subsequently paid it to the defendant. It was decided by this court that the money so paid could be recovered back from the defendant who had received it. So the defendant in the case before us might be held responsible for the truth of facts presumed to be within his own knowledge, and for an implied affirmation, that so far as he was connected with it the draft was not defective. It is not denied however that the signature of the drawer was genuine, nor that the person presenting the draft, and for whose accommodation Pickering indorsed it, was the payee appearing upon its face at that time. The trial court does not find that the payee's name as indorser was forged ; it finds no undertaking on the testator's part save that of an indorser ; and we concur with the General Term in the opinion that his liability was not established. There is no evidence of any intention to create any liability except as indorser. He had all the rights and privileges of one, was therefore subject only to the obligations which that relation imposed, and as he was not charged according to the law merchant, he cannot be held.

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It may be that upon a new trial other facts might be established, but by this appeal the plaintiff has deprived itself of that opportunity ; and as the above views lead to an affirmance of the order appealed from, the respondent will, by force of the stipulation which made the appeal possible, be also entitled to judgment absolute.

Judgment affirmed, and judgment absolute for the defendant.
All concur ; FOLGER, C. J., and EARL, J., in result.

MARVIN V. UNIVERSAL LIFE INSURANCE COMPANY.

(83 N. Y. 278.)

Insurance — waiver of condition by general agent.

Where a policy of insurance provides for forfeiture in case of non-payment of premiums at the stipulated time, and that no alteration or waiver of any condition shall be valid " unless made at the head-office and signed by an officer of the company," an oral extension of the time of payment, by a general agent, at another place, is invalid.

ACTION on a policy of life insurance. The opinion states the case. The defendant had judgment below.

Daniel B. Beach, for appellant.

Geo. A. Strong, for respondent.

FINCH, J. The policy of life insurance upon which this action is founded lapsed by the non-payment of a matured premium. A right to recover upon it is nevertheless asserted upon facts claimed to establish a waiver of the forfeiture, through an extension of the time of payment, and a consequent tender of the premium. One Henkle, it is said, was the general agent of the insurance company, through whom the policy was originally obtained, and by whom the payment of the first premium was extended, and who indorsed upon the policy in the hands of the insured a receipt for such first premium, signing his name as general agent. It is further proved, that after the second premium had matured and while it remained unpaid, Henkle declared in the presence of the assured and the wife of the latter, that he had agreed to extend the time of payment, and that the premium might be paid at any time before he, the agent, made his report to the company; and that if the money was ready by nine o'clock of the next morning it would be time enough.

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It was further shown that Henkle came the next morning; that the amount of the premium, less eighty-eight cents, which he had promised to supply, was offered to him; that he declined to receive it because the assured was then sick and confined to his bed, but promised, in substance, that if the assured recovered, he, the agent, would receive it and keep the policy alive; that the money was then handed by the assured to his wife, who put it in her bureau drawer. Relying upon this state of facts, and claiming that they proved a waiver of the forfeiture, the plaintiff rested her case. The defendant thereupon moved for a nonsuit. The grounds of the motion were distinctly and fairly stated, and fully apprised both the court and the plaintiff of the objections intended to be urged. These were that the premium had not been paid as provided for in the policy, and no waiver had been proved; and that Henkle had no authority to waive payment. The motion was granted, the court putting the decision "on the sole ground that there was no proof of a waiver of the payment due in April, except on condition that the assured should recover his health, and there was no proof that the condition ever happened."

It is very doubtful whether, as against the company, it was proved that Henkle was their general agent. The fact that he so declared by signing the receipt in that capacity, in the absence of any evidence showing knowledge on the part of the company of his assumption of such title and authority, is certainly insufficient. The only other fact relied on is an allegation in the complaint, admitted in the answer, that the original policy was "by its proper officers and general agent duly authorized thereto, made and delivered." But it is not said who the general agent referred to was, and the policy produced was executed only by the president and secretary. The inference that Henkle was in fact the general agent of the company rests therefore upon a very slender foundation.

But a decisive difficulty remains. The policy contained an express provision that any alteration or waiver of its conditions, "unless made at the head office, and signed by an officer of said company, shall not be considered as valid." Granting therefore that Henkle was shown to be a general agent of this company; granting also what was not proved, but perhaps may be inferred from the character of his office (*Carroll v. Charter Oak Ins. Co.*, 1 Abb. Ct. App. 318; *Sheldon v. Atlantic Fire and Marine Ins. Co.*, 26 N. Y. 465), that he had authority, unless restricted, to waive conditions;

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the difficulty remains that he was in that respect restricted, and his authority limited and curtailed by an express provision in the policy itself, thus brought to the knowledge of the assured, and therefore had no power in and of himself to waive the condition of payment, or agree that it should be waived. The cases cited by the learned counsel of the appellant put a broad construction upon the powers of a general agent. *Van Allen v. Farmers' Joint Stock Ins. Co.*, 10 Hun, 399 ; *Pechner v. Phœnix Ins. Co.*, 65 N. Y. 207 ; *Marcus v. St. Louis Mut. L. Ins. Co.*, 68 id. 625. In the latter case it was decided that a clause in the policy that agents were not authorized to make, alter, or discharge contracts did not apply to general agents, who nevertheless had power to extend the time for payments, "in the absence of any restriction on their authority." The true rule, and its utmost extent, was well stated in *Ins. Co. v. Wilkinson*, 13 Wall. 222, cited with approval in *Pechner v. Phœnix Ins. Co.*, *supra*. It was there said in a discussion of the powers of a general agent, that they "are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." The rule could not go further than this without violating all reason and justice. To carry it further would compel us in the end to say that insurance companies are wholly at the mercy of their general agent, and no restraint is possible. Here the policy in plain terms denied to any agent, local or general, the power to waive conditions ; reserved that authority solely to the "head office," and some officer of the company there, and gave notice to the assured upon the face of his policy of the existence of this restriction. Henkle therefore had no power to waive payment. *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5. The assured perfectly well knew the fact. It was his own folly to rely, if he did so, upon the act of the unauthorized agent. This ground of the nonsuit was therefore well taken. By the motion plaintiff was apprised fairly and fully of the objection relied on. We do not see how it could have been obviated, but if that was possible full opportunity to obviate it was given by the objection distinctly stated.

[Omitting unimportant matter.]

The judgment should be affirmed with costs.

Judgment affirmed.

All concur, except DANFORTH, J., taking no part ; FOLGER, C. J., concurs in the result.

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(85 N. Y. 317.)

Insurance — life — accidental self-destruction.

A policy of life insurance, conditioned to be void if the insured should "die by his own hand or act, voluntary or otherwise," is not avoided by his innocently taking a fatal overdose of medicine, while sane.

ACTION on a policy of life insurance. The opinion states the case. The plaintiff had judgment below.

John G. Milburn, for appellant.

D. H. McMillan, for respondent.

RAPALLO, J. The policy contained a condition that if the person whose life was insured should "die by his own hand or act, voluntary or otherwise," the company should not be liable, etc.

The sole defense to this action is the alleged violation of this condition and the ground of appeal is that the court gave improper instructions to the jury in two respects.

First. The defendant contends that the evidence shows conclusively that the deceased came to his death by taking an over-dose of medicine which had been prescribed for him by his physician, and that the court therefore erred in leaving it to the jury as an open question to say whether or not the death arose from that cause. Secondly. That the court again erred in instructing the jury that in order to sustain the defense they must find that the deceased took the over-dose for the purpose of destroying his life, voluntarily, knowingly and intentionally, it being conceded that there was no evidence of any insanity. The exceptions to these two portions of the charge raise the only questions to be determined on this appeal.

As to the first point there is not much difficulty. The evidence strongly tended to show that the deceased took an excessive quantity of the medicine, and that his death was attributable to that cause; but there was no direct evidence of either of those facts.

The conclusions in respect to them depended upon inferences, which it was within the province of the jury to draw. The serious

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question in the case is that which arises upon the charge, that in the conceded absence of any evidence of insanity, the defendant was not exempted from liability unless the deceased took the overdose for the purpose of destroying his own life, knowingly, voluntarily and intentionally.

The ordinary clause in life policies, that the insurer shall not be liable in case the person whose life is insured shall die by his own hand or act, has been repeatedly the subject of judicial construction and it is now well settled that it is not to be construed as comprehending every possible case in which life is taken by the party's act, and that an unintentional or accidental taking of one's own life is not within the meaning of the clause. The taking of one's own life, not accidentally, but under the influence of insanity, has also been determined not to be a violation of the condition, but there has been difference of opinion as to the degree or character of the insanity which exempts from the operation of the condition; some authorities holding that it must be such a degree of insanity as to deprive the party of knowledge of the nature and probable consequences of the act which produced the death, others adopting the rule of the criminal law, that he must have been so far deprived of his reason as to be unconscious of the moral obliquity of the act, and later cases holding, that although possessed of sufficient reason to comprehend the consequences of the act and the moral wrong which it involved, yet if the patient was driven to it by an insane impulse, produced by disease, which disabled him from controlling his own actions, and the death resulted from that cause, the act was not voluntary and the condition was not violated. *Van Zandt v. Ins. Co.*, 55 N. Y. 169; s. c., 14 Am. Rep. 215; *Newton v. Ins. Co.*, 76 N. Y. 426; s. c., 32 Am. Rep. 335.

The question in all cases of this character is the proper interpretation of a contract, and the point of inquiry is what obligations the parties must, from the language used, with relation to the subject-matter and the circumstances, be reasonably supposed to have intended to assume. The clause against suicide is clearly intended to protect the insurance company against the fraudulent act of the insured whereby he may, even at the sacrifice of his own life, secure a benefit to those whom he may desire to favor, at the expense of the insurance company. But as has been already said, it has been held from the earliest day that a suicide committed in consequence of insanity was not within the meaning of the condition, although

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within its literal terms. The decisions establishing this doctrine were placed upon the ground that the death, though apparently caused by the act of the party, was not so caused in contemplation of law, because his mind did not concur in the act, his mental organs having been so diseased as to cease to control his actions, or to guide them in accordance with reason.

At a later day in the history of life insurance some companies, for the purpose of avoiding the difficulties involved in the inquiry as to the condition of the mind of the person committing self-destruction, stipulated for exemption from liability in all cases of suicide, whether "sane or insane." Others adopted the words "voluntary or involuntary," others, as in the present case, "voluntary or otherwise."

It would not be a fair interpretation of this clause, in either of the forms mentioned, to hold it to cover the case of a purely accidental death from poison occurring to a sane person, through mistake or ignorance, though his own hand might have been the innocent instrument by which the deadly potion was conveyed to his lips. Such an accident cannot be presumed to have entered into the minds of the contracting parties, or to have been intended to be stipulated against. The insurance was intended to cover the risk of premature death, which might result from any of the casualties to which human life is subject — self-destruction being excepted. A purely accidental act, committed by a sane person, with no idea of injuring himself, cannot be regarded as an act of self-destruction within the meaning of such a contract. Suicide is the act stipulated against. The words "voluntary or otherwise" preclude the parties claiming under the policy, if the act was one of suicide, from setting up the condition of mind of the party committing it, and contending that it was an involuntary act of suicide. But still it must be a suicide, and who would contend that the taking of poison by mistake, or any other act which a sane person might innocently commit, though it should result in death, was what is ordinarily understood as self-destruction or suicide? It is unreasonable to suppose that one effecting an insurance upon his life, in stipulating against death by his own hand or act, could intend to embrace such a casualty, or that the insurance company could fairly expect him so to understand.

There was no pretense of insanity in the present case. The evidence was such that the jury could reasonably find that the deceased

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considered that he could with safety take the medicine as he did, and that he took it with the intention of better preparing himself for his duties on the next day, and without any intention of injury to himself. In fact it is difficult to find any thing in the case to lead to any different conclusion. Still the judge submitted to the jury the question whether the deceased took the medicine knowing its effect, and did it for the purpose of destroying his own life. But we think that the judge was correct in further charging that if the jury found that the deceased took the medicine without such knowledge or intent, and through mistake or accident, he was not shown to have died by his own hand or act within the meaning of the policy. This is the substance of the proposition excepted to, and we are of opinion that no error was committed.

The judgment should be affirmed.

Judgment affirmed.

All concur, except FOLGER, C. J., absent.

PERRY v. DICKERSON.

(85 N. Y. 345.)

Judgment — former — bar.

A former judgment in an action of damages for wrongful discharge from employment before expiration of the term of service, is not a bar to a subsequent action for wages earned and due before the discharge.*

ACTION for wages. The facts appear in the third paragraph of the opinion. The plaintiff had judgment below.

Brewster Kissam, for appellants.

Jesse Johnson and *Charles A. Richardson*, for respondent.

ANDREWS, J. To sustain the plea of a former judgment in bar of a second action, it must appear that the cause of action in both suits is the same, or that some fact, essential to the maintenance of the second action, was in issue and determined in the first action adversely to the plaintiff. In order to establish an identity between

* See *Ressequie v. Byers* (52 Wis. 650), 38 Am. Rep. 775, and note, 778.

the causes of action in the two suits it is not necessary that the claim made in the first action embraced the same items sought to be recovered in the second. It is sufficient to bring the second action within the estoppel of the former judgment, that the cause of action in the former suit was the same, and that the damages or right claimed in the second suit were items or parts of the same single cause of action upon which the first action was founded. The law, to prevent vexatious or oppressive litigation, forbids the splitting up of one single or entire cause of action into parts, and the bringing of separate actions for each ; and neither in this way nor by withholding proof of particular items on the trial, nor by formally withdrawing them from the consideration of the jury, can the effect of the judgment, as a complete adjudication of the entire cause of action, be prevented. There can be but one recovery for an injury from a single wrong, however numerous the items of damage may be, and but one action for a single breach of contract. *Farrington v. Payne*, 15 Johns. 432 ; *Smith v. Jones*, id. 229 ; *Miller v. Covert*, 1 Wend. 487. But while the general principle is undeniable, that a former judgment on the same cause of action bars a second action between the same parties, it is not always easy to determine when the causes of action are identical, or what is to be deemed a single or entire demand within the authorities.

In *Guernsey v. Carver*, 8 Wend. 492; 28 Am. Dec. 60, it was held that all the items due on a running account for merchandise sold, constituted but one demand, and that a recovery in one action for a part of the items is a bar to a subsequent action for the residue. The same rule was applied in *Stevens v. Lockwood*, 13 Wend. 646; 28 Am. Dec. 492. In *Colvin v. Corwin*, 15 Wend. 557, a judgment in an action to recover the price of one lottery ticket sold to the defendant by the plaintiff's agent, was held to be a bar to a second action to recover the price of another lottery ticket, purchased of another agent at a different time and place. The decision proceeded on the ground that the two sales constituted but a single demand or cause of action. This case was strongly disapproved in *Secor v. Sturgis*, 16 N. Y. 548, the court saying that it rested on no sound principle, and that it was a plain case of distinct and independent causes of action. The case of *Bendernagle v. Cocks*, 19 Wend. 207, also proceeded upon the doctrine established by the earlier decisions, that an entire demand could not be severed, and separate suits brought thereon. If the case is

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subject to any criticism it is because of the application of the doctrine to the facts of the case. The action was for breaches of distinct covenants to pay for manure and for work and labor, contained in an indenture of lease. The defendant pleaded in abatement that the plaintiff had brought a prior action upon the lease, for the breach by the defendant of certain covenants therein on his part, which was still pending. The plaintiff replied that the covenants upon which the first suit was brought were other, distinct and different from those sued upon in the second action. The court sustained the defendant's demurrer to the replication, and he had judgment. It may be inferred from the opinion of Judge COWEN that all the covenants in the lease were for the payment of different amounts of money by the lessee to the lessor; and the learned judge seemed to regard it like the case of a contract to pay money in installments, and in this way reached the conclusion that the different breaches constituted a single cause of action. "Looking," he says, "as I think we must, on the several defaults to pay items, as so many successive breaches of a single contract, we here have an authority for saying that all such breaches are but parts of one indivisible demand, so far as they were committed at the commencement of the suit."

The only question presented for our decision in this case arises upon the defense, setting up in bar of the action, the judgment obtained by the plaintiff in a justice's court, in March, 1879, for \$22, besides costs, in an action brought against the defendants subsequent to February 10, 1879, for having wrongfully dismissed him from their employment on that day, in violation of their contract to employ him for the period of a year from June 22, 1878. The present action is brought for wages stipulated to be paid by the contract of employment, and earned and due, at the time of the wrongful dismissal. The plaintiff, neither in his complaint nor on the trial in the justice's action, claimed to recover the wages earned. The claim for wages was expressly excluded by the terms of the complaint. It was an action solely for damages for the wrongful dismissal. On the other hand, in this action, the complaint sets out the contract of employment, alleges the rendition of services thereunder, and that the sum of \$155.55, was due and owing the plaintiff therefor, for which sum judgment is demanded. There is no averment of a wrongful dismissal, and no claim for damages therefor.

The decision of the question, whether the judgment in the justice's action is a bar to this action, turns, we think, upon the point whether the claim for wages earned and due before the wrongful dismissal, and the claim for damages for such dismissal, constituted a single and indivisible demand, within the authorities, or two separate and independent causes of action. It is doubtless true that the plaintiff could have prosecuted in one action the claims for wages and for damages for the wrongful dismissal. But it is not a test of the right of a plaintiff to maintain separate actions, that all the claims might have been prosecuted in a single action. A plaintiff having separate demands against a defendant on contract, or arising from distinct trespasses or wrongs, is not required to combine them in one action, although in most cases he may do so at his election. He may prosecute them separately, subject to the power of the court, in furtherance of justice, and to prevent undue vexation and costs, to order the actions to be consolidated. *Phillips v. Berick*, 16 Johns. 136; 8 Am. Dec. 299. That the claims for wages earned and due before the dismissal, and for damages for the wrongful dismissal constituted two separate and independent causes of action, is clear upon reason and authority. The right to recover the wages was complete and perfect, before the right to damages accrued. Upon the wrongful dismissal, a new cause of action arose, wholly disconnected, in its origin and nature, with the claim for wages. A suit by a servant for wages due is consistent with the continuance of the contract of employment, and of actual service thereunder. A suit for wrongful dismissal proceeds upon the ground of an entire repudiation of the contract by the master. The suit for wages is brought to recover for services rendered; the action for wrongful dismissal, to recover compensation for the loss of a situation, and for not being allowed to serve and earn wages under the contract. The wages could not have been proved or recovered under the pleadings in the justice's action, nor the damages for the wrongful dismissal in this. In an action for wrongful dismissal, occurring in the middle of a quarter or period, before wages are due and payable under the contract of employment, compensation for services in the broken quarter or period may be recovered as part of the damages, for by the wrongful dismissal the plaintiff was prevented from earning the wages for the broken quarter under the contract, and compensation for the service actually rendered is justly allowed as part of the damages. This was decided in *Goodman v.*

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Pocock, 15 Ad. & Ell. (N. S.) 576. The plaintiff in that case was dismissed in the middle of a quarter, and had brought a former action; joining in the declaration counts in assumpsit for work and labor, etc., with a special count for a wrongful dismissal. On the trial of that action the judge ruled that the plaintiff could not recover for services in the broken quarter, under the special count, because what might be due for such service was recoverable under the *indebitatus assumpsit* count only, and that no recovery could be had under that count, because the claim was not included in the particulars. Afterward the plaintiff brought his action to recover for services in the broken quarter, and it was held that those services should have been proved and allowed as damages in the first action, under the special count, and that a second action therefor could not be maintained. The misdirection of the judge in the first action did not prevent the judgment therein operating as an estoppel, upon the well-settled rule that such errors are to be corrected by a direct proceeding in the action in which they are committed. The case of *Hartley v. Harman*, 11 Ad. & Ell. 798, is an authority upon the proposition that in an action for wrongful dismissal, wages earned and due at the time of such dismissal are not recoverable. The cause of action for wages is independent of the wrongful dismissal. The amount of wages earned and due are in no sense a part of the damages resulting from the wrongful dismissal. See also *Smith Mast. and Serv.* 96, 97.

Assuming therefore as the conclusion from reason and authority, that the claim for wages earned, and the claim for wrongful dismissal, constitute two separate and distinct causes of action, it follows that a suit and judgment upon one of them is not a bar to a suit on the other, unless there is some general rule or principle of law, distinguishing between different causes of action arising out of one instrument or contract, and causes of action arising out of separate contracts, which requires that in the former case, all the causes of action for which there is a present right of action shall be governed and treated, for the purpose of prosecution, as though they constituted one entire and indivisible demand.

We are of opinion that no such general principle is established in the law. The cases in respect to running accounts proceed upon the rational ground that it is implied, from the nature of the dealing, that all the items are parts of one continuous transaction, and shall be regarded as representing a single demand. *Bendernagle v. Cocks*

is an extreme case upon the point of what shall be deemed a single demand, or cause of action. But we think it cannot be regarded as establishing, that the bare fact that different causes of action spring out of the same contract, *ipso facto* renders a judgment on one a bar to a suit on another, however distinct that may be, or however dissimilar the breaches, in their nature or origin.

In this case the causes of action for wages and for a wrongful dismissal in a sense arise out of the same general contract. But the right to the wages was given by the contract. The right to damages results from the wrongful termination of the employment, which, so far as the defendants could do so, put an end to the contract altogether. The right to recover the wages, and the amount the plaintiff was entitled to therefor, was definite or capable of being made so at the very time they were due. The damages for the wrongful dismissal were incapable of exact ascertainment until the period for which the plaintiff was hired had expired, as they might be mitigated by his procuring other employment. In such a case must a plaintiff postpone his action for wages until the period of employment has expired? Or if he sues for his wages immediately on the dismissal, must he join in that action his claim for damages? We are of opinion that this alternative is not presented to him, and that he may bring his action upon either of the causes of action, without being barred by judgment thereon, from subsequently bringing an action on the other.

It is to be recollected that the principle is that a former judgment is a bar to a subsequent action when it is for the same cause. It would, we think, be unwarrantable to hold that the causes of action in the justice's suit and in this are the same, or to treat the two causes of action as one, for the purpose of bringing the claim for wages within the estoppel of the judgment in the first action.

The judgment of the General Term should be affirmed, with costs.

Judgment affirmed.

All concur, except FOLGER, C. J., absent.

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WEYH v. BOYLAN.

(83 N. Y. 394.)

Estoppel — certificate that mortgage is valid.

A mortgagor certifying in writing, under oath, that his mortgage is valid, and will be such in the hands of certain proposed assignees, and that he has no defense thereto, is estopped from setting up the usuriousness of the mortgage, as against those assignees, or their assignees, purchasing the mortgage in reliance on the certificate. (*See note, p. 673.*)

ACTION to foreclose a real mortgage made by Flaherty to Boylan. Defense of usury. The plaintiff was the assignee of Shancupp and Goldberg. The mortgagee on assigning to the latter, procured from the mortgagor his sworn certificate in writing that the mortgage was a valid lien upon the premises to its full amount, and would be so in the hands of Shancupp and Goldberg, and that he had been notified that they would purchase it on the faith and credit of that certificate. The trial court found the mortgage void for usury and dismissed the complaint, and this was affirmed at General Term.

Jacob A. Gross, for appellant.

Manning C. Wells, for respondent.

DANFORTH, J. It would, I think, be difficult to work out from the evidence in this case an usurious agreement, but upon another trial it may be added to or given a new direction, and therefore a consideration of what now appears would be to no purpose. But assuming the existence of usury, the question remains whether the defendant is precluded by the certificate from setting it up. It is well settled that where an assignee takes a chose in action by assignment with the debtor's assent, although he merely stands by in silence, the debtor is estopped to impeach it. *Watson's Ex'rs v. McLauren*, 19 Wend. 562. Much more should he be estopped as against an assignee for value by the explicit written declaration that he has no defense or set-off to the debt assigned; and the principle on which the doctrine stands extends even to the defense of usury. *Smyth v. Monroe*, 84 N. Y. 354; *Payne v. Burham*, 62 id. 69. It is however subject to the qualification that the person by whom

it is invoked must not be a stranger to the transaction, or one whose conduct the declaration was not designed to influence. The defendant contends that the plaintiff is excluded from its benefit by both of these conditions. First. The plaintiff is an assignee for value, and it is evident that the certificate made by the defendant contains a representation inconsistent with his defense. He says however the statement in the certificate is fictitious. The plaintiff replies it is nevertheless to be treated as true; and upon this, unless the defendant's position is well taken, he must prevail. It does not appear that the defendant had the plaintiff in his mind when the statement was made, but he did have the subject-matter of his false representations, and I am unable to give less effect to the certificate than it would be entitled to had it been addressed directly to the plaintiff. It is to be taken as if directed to whom it might concern. It related to an act not only likely to, but which he anticipated would occur—an assignment and the purchase of the mortgage by an assignee—hence his representation in terms that “it will be good and valid in the hands of an assignee”; to such a one, whoever he may be, the defendant addresses his statements. The plaintiff in fact read these statements, and relying upon the representations, became an assignee and paid the full sum, for the payment of which the mortgage purported to be a security. It can hardly be necessary, in view of such facts, to look up authorities to show that the defendant cannot now say the statements were false. The ground on which he is precluded from saying so is that to permit it would be contrary to equity and good conscience. Under the statute relating to interest, his submission to pay usury gives him a legal defense, but upon the circumstances of the case he would, if it prevailed, obtain an unconscientious advantage at the expense of an innocent person, and so he should not be allowed to maintain it. And to no other effect can the doctrine of estoppel, which Coke declares to be “an excellent and curious kind of learning” (Coke's Litt. 352 a.), be better applied. In such a case it cannot be said to be odious, for it thus suppresses fraud and promotes honesty and fair dealing. The transfer of the mortgage was effected upon the defendant's representations of its validity, and the plaintiff acted upon those representations. There is however authority for this result. In the very elaborate and carefully considered opinion of PERLEY, C. J., pronounced in *Horn v. Cole*, 51 N. H. 287; s. c.,

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12 Am. Rep. 111, he says : “ If the representations are such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them against any one who has trusted to them and acted on them.” In *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616, a case of estoppel was said to be made out when a representation was made with a view or expectation that it would be acted upon by another, and it had been so acted upon, and the person relying upon the representation would be injured if it was withdrawn. There was then before the court a party, claiming by assignment under a certificate of stock issued to one W. T. Riggs, insisting that the defendant should recognize it. Upholding that claim, the court say : “ When the defendant issued its certificate to William T. Riggs, it affirmed to all persons who might deal with him, that he owned a certain portion of its capital stock and had full power to transfer it,” adding : “ Any purchaser has a right to rely upon this statement, and to claim the benefit of an estoppel in its favor ;” and the decision is put not upon any view of the negotiability of the certificate, but upon the principles appertaining to the doctrine of estoppel. In *Ashton’s Appeal*, 73 Penn. St. 153, the court recognize the general principle which affects an assignee with all the equities existing in favor of the mortgagor, but say that he may be estopped as against the assignee “ by the declaration that he has no defense or set-off to the debt assigned,” and that “ the benefit of it is not confined to the immediate assignee, to whom or for whose security it was made, but that any subsequent assignee claiming under him may avail himself of it.” “ When such a declaration,” say the learned editors of *Leading Cases in Equity*, “ is made in writing by a mortgagor, it becomes a muniment of title, and may be conclusive in favor of third persons who give value on the faith of it, or whom it contributes to mislead.” *Ryall v. Rowles*, Lead. Cas. in Eq. (White & Tudor) vol. 2, part 2, p. 1673.

But the learned counsel for the respondent insists that the certificate is by its terms confined to Mesdames Shancupp and Goldberg. Such is not the finding of the trial court ; nor is the certificate susceptible of this limitation. The language, as given in the above statement, is general, addressed to any person who thereafter occupies to the mortgage the relation of an assignee. It is true the mortgagor says : “ And I further certify that I have received

notice of the intended assignment of said bond and mortgage by said Owen Flaherty to Helena Shancupp and Rachel Goldberg, and that such assignment will be taken on the faith and credit that all the matters herein stated are true." There is no finding that these persons knew to the contrary of the statements. But if we assume, as the respondent does, that they did, or that for some reason the estoppel would not work in their favor, it does not alter the plaintiff's position. The words of the declaration are, as we have seen, general. They relate to a subject-matter transferable by assignment and concerning which a prudent assignee would desire information. Suppose the intended assignment had fallen through, can there be a doubt that the declaration might be safely relied upon by any person who in ignorance of its falsity paid value for the mortgage? I think not. The fact that it was in good faith acted upon renders it conclusive, and it is of no importance whether it was made expressly to that person or not. It was intended for any one who might contemplate a purchase of the securities, and when acted upon was equivalent to a representation or statement to him. But assume that it would not avail the first assignees, if it did not, it would be because they knew the statement to be false. Their knowledge would not affect a purchaser from them in ignorance of that fact and who relied, as the plaintiff here did, upon the mortgagor's statement. He is protected by the same principle which a *bona fide* purchaser for value and without notice successfully invokes, although the title comes to him from a person in whose hands it is affected with notice (1 Story's Eq. Jur., §§ 409, 410), and through which one who buys a non-negotiable chose in action is protected against the claim of the true owner, where the latter has by his own affirmative act conferred the apparent title and absolute ownership upon another. *Moore v. Met. Nat. Bank*, 55 N. Y. 41; s. c., 14 Am. Rep. 173; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; s. c., 7 Am. Rep. 341. The plaintiff's right does not depend upon the real title or interest of his assignor, but is measured by the representation of the mortgagor.

Second. The next contention of the respondent is that the certificate is of no greater effect than the same language would be if written into the mortgage. It seems to me not well founded. It is true that it bears the same date, and was executed at the same time. But no fraud was practiced in obtaining it, and the statute which makes the mortgage void by no means compels a borrower to

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avail himself of its provisions. He may not only waive the statute, but as we have seen, may be withheld from resorting to it. If the statement was in the mortgage, it would fall with the contract, because of the statute which would annul the instrument ; but it is apart from it and goes beyond the language contained therein, and this distinction is enforced in *Clark v. Sisson*, 22 N. Y. 312, where it was held that to estop the parties to a bill of exchange, their representations in respect to its consideration and validity must be outside the face of the bill ; while in *Mechanics' Bank of Brooklyn v. Townsend*, 29 Barb. 569, it was held that a certificate relating to the same matters, given at the time of executing the note and annexed thereto, will estop the party giving it from falsifying his own statements, and prevent his setting up the defense of usury against a subsequent holder who has discounted it for full value on the faith of the certificate. In *Wilcox v. Howell*, 44 N. Y. 398, to which case the respondent refers as holding otherwise, the defense was not usury, but fraud, and both the mortgage and certificate were obtained by it. But besides that, it was there found, as a fact, by the trial court, that the plaintiff did not rely upon the truth of the statements in the certificates in purchasing the mortgage. The contrary appears here, and the case is brought directly within the principle recognized in that case by the learned judge who delivered the opinion. "If," says EARL, J., "this certificate was given by the mortgagor without fraud, to induce the plaintiff to purchase the mortgage or to enable the mortgagor to negotiate it, and the plaintiff took the mortgage, believing in and in good faith relying upon the certificate, then the mortgagor would be estopped from availing himself of the defense of fraud." Such is the case here.

It follows that the judgments of the General and Special Terms should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur, except FOLGER, C. J., absent.

NOTE BY THE REPORTER.—The like doctrine was declared in *Robertson v. Hay*, 91 Penn. St. 242. The court said : "It matters not that Gill may have sold the mortgage and caused it to be transferred before he was authorized so to do, under the private instructions given him by the mortgagor ; nor that he failed to account to the latter for the money received therefor. These facts are insufficient to defeat a recovery by the assignee. The papers which the mortgagor executed and placed in the hands of Gill not only impliedly authorized a sale of the bond and mortgage, but invited purchasers by expressly declaring that he had 'no defense of any kind whatever.' *Ashton's Appeal*, 23 P. F. Smith, 153 ; *Hutchison v. Gill*, *post*, 253. This written declaration fresh from the mortgagor

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having been shown to the assignee when he was about to purchase, it is idle to say he should have gone to the mortgagor personally and inquired if there was any defense. This certificate was addressed 'to all whom it may concern.' It could not have been more effective and conclusive notice to one about to purchase, that the mortgagor had no defense, if it had been addressed to the purchaser by name. The main purpose of the execution and delivery of such a certificate is to dispense with personal inquiry. At the same time it gives certainty to the declaration and perpetuates the evidence thereof. It is a well-settled rule that where one of two innocent persons must suffer from the tortious act of a third, he who gave the wrong-doer the means of perpetrating the wrong must bear the consequences of the act. By placing the papers in the hands of his agent or attorney, the mortgagor gave him the means of making sale of the mortgage and of obtaining the money of the assignee. The fraud which Gill may thereby have practiced on the mortgagor cannot operate to the prejudice of the innocent and good faith purchaser."

In *Hutchison v. Gill*, 91 Penn. St. 253, the court said: "When a mortgagor, at the same time that he executes a mortgage, delivers to the mortgagee a writing certifying that he has no defense or defalcation, it is in effect an agreement that the mortgagee shall negotiate the mortgage. It is an acknowledgment that he has received full consideration. It is indeed most usual to execute such writings when no consideration has been received, and the sole object of the mortgage is to raise money by the sale of it. It would be in the highest degree inequitable to allow the mortgagor to set up that there was fraud in obtaining the mortgage, or in a misappropriation by the mortgagee of the money raised by the sale."

 WARD V. KILPATRICK.

(85 N. Y. 413.)

Fixtures — mirrors in wall.

Mirrors set in walls of a dwelling-house, the frames corresponding with the cabinet work of the rooms, and some of the frames being arranged for hat racks and umbrella stands, and the removal of which would leave the walls unfinished, are fixtures upon which a mechanics' lien will attach.

SUFFICIENTLY reported in note, 37 Am. Rep. 472.

 TIEMYER V. TURNQUIST.

(85 N. Y. 516.)

Marriage — wife's liability for necessities purchased on her credit.

A married woman is liable for necessities purchased by her upon credit, and for her oral promise to pay for them, although they are intended for and are used by her husband and children as well as herself, and although at the time of the purchase she had no separate estate.*

* See *Wilson v. Herbert* (12 Vroom, 454), 32 Am. Rep. 243. The principal case must be regarded as overruling *Baker v. Harder*, 6 T. & C. 440; *Wier v. Groat*, id. 444; and *Salmon v. McEnamy*, 23 Hun, 87; and supports *Crisfield v. Banks*, 24 id. 159.

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ACTION on account for groceries. The opinion states the case. The plaintiff had judgment below.

S. B. Brownell, for appellant.

Thomas V. Cator, for respondent.

FINCH, J. [Omitting immaterial matter.] The facts found by the referee were in substance the following: The wife was not engaged in any trade or business, and had no separate estate, except only her interest in a policy of insurance upon the life of her husband, taken out under the act of 1840, and payable, upon his death, to her if she survived him, but if not, then to their children, of whom there were several. The husband applied to the assignor of the plaintiff for credit in the purchase of supplies for the family, but was refused because he was irresponsible and out of work. In the emergency the wife intervened, and bought upon her credit, promising explicitly, to induce the sale to her, that she would pay the debt out of the proceeds of the policy of insurance when it should mature and be paid to her. By this means she obtained credit, the property was sold and delivered to her, and she used it, as she all the time intended, for the food and comfort of the family, including the husband. These findings are not without evidence, and are conclusive upon this appeal, though the controversy upon the question to whom and upon whose credit the goods were sold was severe and close.

Upon this state of facts it was argued in behalf of the plaintiff that the wife who made the contract of purchase had a separate estate, which consisted of her interest in the policy of insurance upon her husband's life, and expressly charged that separate estate with the payment of her debt to plaintiff; that although that interest was contingent and depended upon her survival of her husband, it was nevertheless property, something of value, peculiarly and separately hers, and capable, but for statutory enactments, of being by her assigned and transferred; and therefore being possessed of a separate estate, and having expressly charged upon it the obligation sued upon, she became personally liable for the debt. *Manhattan B. & M. Co. v. Thompson*, 58 N. Y. 80.

It was contended, on the other side, that the interest of the wife in the policy of insurance was not, in any just sense, her separate estate; that by its very terms, and its inherent and essential character, it was not to be realized or transmuted into actual property

until after the death of the husband, and when the question of a separate estate would have disappeared; that it was wholly contingent upon her life, and in case of her death before its maturity would go to her children, entirely unaffected by any act or contract of hers; that even if it could be deemed a separate estate, it was not charged with the debt in question, because it could not be; that the policy was issued under the act of 1840, and was not assignable, *Eadie v. Slimmon*, 26 N. Y. 17; *Barry v. Equitable Life Ass. Soc.*, 59 id. 587; *Wilson v. Lawrence*, 76 id. 585; that under the amendment of 1879 it is only assignable with the written consent of her husband; that the wife cannot traffic with it or anticipate its proceeds, but it must be kept intact as a provision for widowhood; and that the rule of the statute and of the courts, making it non-assignable and seeking to preserve it, becomes useless and a nullity if the wife may, in the life-time of her husband, contract debts upon its faith, and so anticipate and absorb its proceeds.

The questions thus raised are interesting, and calculated to produce sincere debate. It does not however seem to us necessary to decide them, since we are of opinion that the defendant is liable upon her contract, irrespective of her interest in the policy of insurance, and disregarding that entirely, and upon a ground differing both from that of the General Term and that of the referee. The latter states a true ground of liability, but sustains it in the end by a reference to the policy of insurance as constituting a separate estate in the wife. It has been long settled that a married woman is liable upon her contract when its consideration goes to the benefit of her separate estate. Resting upon that rule, the referee argues that the groceries bought of defendant enabled the husband to pay the premiums on the policy of insurance, and so served for its protection and went to its benefit. The facts were found in accordance with this theory, which however seems to us not beyond possible criticism, and requires for its support a direct adjudication that the policy of insurance constitutes a separate estate in the wife. We need not affirm or deny the proposition involved, since the view we take of the case is wholly independent of the doctrine stated by the referee.

We have held that where a married woman buys real estate she is liable for the purchase-money, although at the time of the purchase she had no separate estate, save that only acquired by her contract, and although she did not in terms charge the debt

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upon her separate property. *Cashman v. Henry*, 75 N. Y. 103 ; s. c., 31 Am. Rep. 437. We determined, that as incident to her right to acquire real and personal property and hold it to her sole and separate use, she might purchase upon credit, and would be liable upon her contract as a *feme sole*. The amendment of 1862 allows a married woman to hold as her separate property that which she acquires by purchase as well as that obtained in the modes previously permitted. Out of this right to purchase inevitably flows her liability for the price. That right was broadly given without limit or restriction, and intended to be completely and beneficially given. It was not narrowed to a purchase for cash, or a consideration paid down in full, but she was left at liberty to purchase as freely as a man might purchase, and upon credit if she should so choose. That involves her personal liability. Without that credit is impossible. Without that we should be held to the absurd proposition that the wife might buy, but should not be bound to pay; and as a practical consequence, we should restrict her right to purchase, which the statute gives fully and without restriction. In this view of the case it matters not what kind of property is purchased, or with what purpose or intent it is obtained. In the present case the property bought was family groceries, intended to be consumed for the joint benefit of the whole family, and not to be held for the sole and separate use of the wife alone. That fact seems to us unimportant. If she buys on her own account she must expect to be herself liable for the price. No law prescribes or limits the kind or character of property which she may acquire, nor does it dictate what she shall do with it when it becomes her own. If it was money or land she might consume it in the support of her family, and it is none the less her separate property because she chooses not to hold it as such but consumes it for the benefit of others, as well as herself. It is enough that it is hers; hers to keep or give away, or sell, or consume in the support of her family. It may now be stated broadly as a rule both of law and justice, that the married woman who buys property which becomes her own is liable for the purchase-price. She who buys must expect to pay.

[Minor matters omitted.]

The judgment should be affirmed with costs.

Judgment affirmed.

All concur, except FOLGER, C. J., absent; RAPALLO, J., concurring in result.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

MILLER V. LASH.

(85 N. C. 51.)

Limitation — expectation of compensation for services by will.

Where one renders service for another, for no agreed term, but during a course of years, upon a mere expectation of being remunerated by the employer's will, and the will makes no such provision, the statute of limitations attaches, not from the testator's death, as in the case of an explicit agreement to the above effect, but from the end of each year in which the services were performed.

ACTION for services. The opinion states the case. The plaintiff had judgment below.

J. M. McCorkle, Starbuck and Bailey, for plaintiff.

J. M. Clement, for defendants.

SMITH, C. J. In this action the plaintiff seeks to recover from the defendants, administrators of I. G. Lash, compensation for services rendered their intestate in the management and supervision of his domestic affairs and providing for his servants at Bethania, for

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a series of years succeeding 1849 ; and also for her special personal care and attention to the intestate himself, at his residence in Salem, for more than two years and a half preceding and until his death on April 17, 1878. The summons was sued out, after an ineffectual demand, on the 30th day of September following. There was much testimony offered to show the nature and value of the plaintiff's services and the high estimate put upon them by the deceased, but there was no evidence of any special contract or understanding between the parties as to their duration or compensation ; and the defendants insisted, from their relations and dealings with each other as disclosed by the witness, it was to be inferred that what was done by either was intended to be and was gratuitous ; and they further contended, that if the plaintiff was in law entitled to remuneration, she could recover for such services only as were performed within three years next preceding the bringing of the action. There was proof of declarations of the intestate of his high appreciation of the plaintiff's services, of their extent and usefulness, and of his intent to make a liberal provision for her in his will on account of them ; and of her declarations to the effect that she was not acting as a hireling nor to be rewarded as such. It was also shown that at the intestate's instance, a paper writing was produced on one occasion bearing his signature, and then attested in his presence by a witness. The instrument was not read by the witness nor explained by the deceased, and he knew nothing of its nature or contents.

Numerous exceptions were taken during the trial which with the testimony (much of it wholly irrelevant to the points presented) reiterated with equal particularity of detail in the case prepared on the appeal accompanying the record. But it is necessary in our view of the case to notice and pass upon one only — that arising on the defense under the statute of limitations.

Among the instructions prepared by the plaintiff's counsel and presented to the court to be submitted to the jury, the third is in the following words : If the jury believe that the plaintiff was to serve the defendant's intestate for no certain or determinate time, and not from year to year, then no part of the claim for services is barred by the statute of limitations. The court so charged, adding, "if the services were to be paid for by the week, month or year, then the statute will bar the action for all sums which were due to be paid three years prior to the bringing of the action ; if the ser-

vices were to be continuous, and no amount fixed to be paid, and no time fixed for payment, the statute will not begin to run until the death of the intestate."

The defendant's counsel requested and were refused this modification: "In the absence of express contract a right of action accrued, as the services were rendered on the implied promise, and as there was no credit, the law implied that every day's service was to be paid for what it was worth."

To these rulings exception is taken, and out of them arises the question we propose to examine, which is, whether services thus rendered for a series of years under no definite contract as to duration, rate, or mode of compensation, other than that implied by law, are without the operation of the statute of limitations until put an end to by the death or positive act of one of the parties?

The authorities cited in the argument for the plaintiff seem to establish the proposition that where personal services are performed by one person for another during life under a contract or mutual understanding, fairly to be inferred from their conduct and declarations and the attending circumstances, that compensation therefor is to be provided in the will of the party receiving the benefit of them, and the latter dies intestate or fails to make such provision, the subsisting contract is then broken, and not only will the action then lie for the recovery of their reasonable value, freed from the operation of the statute, but it could not be maintained before. It is equally plain that if the services were given in the mere expectation of a legacy, without a contract express or implied, and in reliance upon the gratitude and generosity of the deceased, the action cannot be sustained. *Little v. Dawson*, 4 Dall. 111; *Swires v. Parsons*, 5 W. & S. 357; *Nimmo v. Walker*, 14 La. Ann. 581; *Riddle v. Backus*, 38 Iowa, 81.

In *Osborne v. Governors of Guy's Hospital*, 2 Str. 728, Chief Justice RAYMOND told the jury that if the plaintiff did not expect to be paid for transacting certain stock affairs of the deceased, but to be considered for it in his will, "they could not find for the plaintiff, though nothing was given him by the will, for they should consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy cannot afterward resort to his action."

In *Patterson v. Patterson*, 13 Johns. 379, VAN NESS, J., delivering the opinion of the Supreme Court of New York in a case

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where the evidence showed the existence of such mutual understanding as to the mode of remuneration, and suit was instituted during the life of the recipient, remarks: "The defendant is bound to make, and it is presumed will make, such a provision for the plaintiff in his will as will do him perfect justice, and which may be perfectly satisfactory to him, or which in judgment of law may amount to a satisfaction." He adds that upon failure the plaintiff can maintain his action upon a *quantum meruit*, but he cannot until such failure occurs. This statement of the law is substantially embodied in the second of the series of instructions asked and given, and would not be obnoxious to complaint if there were evidence of facts to which it would properly apply. But the testimony does not disclose any agreement or such facts as warrant the deduction of a common or mutual understanding, so as to make a contract broken by intestacy, and give legal validity to the demand. Certainly, frustrated expectations of a bounty, not the offspring of agreement, furnish no ground in support of an action. The evidence does however authorize the inference involved in the verdict and necessary to its support, that the services were not nor intended to be gratuitous, although there was none to enable the jury to solve the inquiry contained in the third instruction, upon the answer to which is made to depend the applicability of the statutory bar to any part of the claim, extending, as it does, over a period of twenty-nine years. There was no evidence as to the terms of the implied contract, the sole proof being that valuable services were performed for the intestate during that long interval, for which remuneration is due.

The question then is, is it to be assumed in the absence of evidence, that compensation is not to become due at definite periods, and does become due at and not before the intestate's death, and thus the statute remain inactive during his life? Such was the charge, as we understand it, asked and substantially given with the explanatory supplement. At least such seems to have been its practical effect in guiding the jury to their verdict.

This view of the law is sustained in the remarks of the late chief justice (erroneously ascribed to Justice RODMAN in the reports), delivering the opinion in *Hauser v. Sain*, 74 N. C. 552, where the facts were somewhat similar and the statute had been held in the court below to exclude all claim for labor performed more than three years before the commencement of the suit. He says: "His

honor erred in ruling that the plaintiff's right of action was barred by the statute of limitations, except as to the last three years. There was no reference to the number of years that the plaintiff was to render his services, nor was she to perform those services from year to year. So it was indefinite as to time, and her right of action did not accrue until her service terminated by the death of her grandfather."

This exposition of the law, proceeding from a judge so thoroughly familiar with its principles, and entitled to great consideration, was given nevertheless upon a ruling adverse to the plaintiff and which was not before the court for review upon the defendant's appeal. It is but an expression of opinion upon an incidental question not presented in the appeal, and has not the force of an adjudication upon the point. It contravenes moreover the decision of the judge who tried the cause in which the plaintiff's counsel acquiesced, in not asking for a review or correction. It is however in consonance with the ruling of the Supreme Court of Indiana, which sustains and approves the following charge to the jury: "If the plaintiff performed labor for the defendant's intestate under an agreement to be paid therefor, without specifying at what time such payment should be made, or how long such labor should be performed, then the statute of limitations would not commence running until such labor was ended. *Little v. Smiley*, 9 Ind. 116.

The contrary view has been taken in other cases, of the legal consequences of the rendition of services wholly indefinite in time and rate of compensation.

In *Baxter v. Neuse*, 3 T. R. 10, TINDALL, C. J., thus declares the law: "The general rule of law is, that when there is nothing to contradict, if a person engages another upon a service, that is in its nature a lasting and enduring service, the engagement is for a year; but the law always looks at the nature of the contract as affected by usage in determining its import."

In *Davis v. Gorton*, 16 N. Y. 255, JOHNSON, J., reviewing the report of the referees upon exceptions, then proceeds as follows: "The referees have found that no time was fixed for the termination of the employment, nor for the payment therefor, and that the services in question were rendered under a general employment and retainer, and that they were continued without interruption from their commencement to their termination, a period of thirteen years. The referees have not found that the services were performed

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under a contract, that they should be paid for after Morris' death in case he did not provide by will for the compensation of the parties who rendered them; but they are placed upon the mere ground of service, to be paid for at their value without any express agreement as to the time or measure of compensation or the time of employment. The law will not, I think, intend, in respect to permanent and continuous employment, an agreement as to compensation, so unusual in its character, and so little conducive to the interests of either party to it, as that the payment of any compensation shall be postponed until the termination of the employment. We think it should be deemed a hiring by the year.

So Chief Justice THOMPSON, of the Supreme Court of Pennsylvania, in trying a cause before the jury, where the facts were not unlike those in the present case and quite as favorable to the plaintiff, charged them upon this point in these words: "If there were nothing more in the case than simply that the plaintiff entered into the employ of the decedent seven or more years ago, without any definite arrangement between them as to the amount of wages or as to time for compensation, then the law would imply that she was to be paid what her services were fairly worth; that would be for you to determine, and the law would imply that she was to be paid for these services from time to time as they were rendered. In the event of the merely implied contract between the parties, the plaintiff could not recover for the whole time of her services, because here the statute of limitations steps in and limits her recovery to what her services were worth during a period of six years prior to the time of suit brought."

There was no exception to this ruling in the appeal, the counsel acquiescing in it as in the case of our own reports.

In this conflict of opinion we are disposed to adopt as the more correct exposition of the law applicable to the facts, that for indefinite and continuous services payment may be required *toties quoties*, otherwise no action would lie until death, or perhaps until an end is put to the relations subsisting between the parties by the act of one of them, and hence there being no default before, interest cannot accrue on detached parts of the demand. The allowance of interest is incompatible with the supposed unity of the implied promise, which is thus put beyond the reach of the statute.

We are of opinion then that the unexplained fact of labor performed and extending over a series of years raises no implication

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that payment is to be made at any fixed period, unless perhaps annually, as controlled by a prevalent custom appropriate to the kind of service and entering into the contract, when it so appears in evidence. The implied promise is to pay for services as they are rendered, and payment may be required whenever any are rendered; and thus the statute is silently and steadily excluding so much as are beyond the prescribed limitation.

There was error then in allowing the jury to find without evidence the terms and conditions of the implied contract, and thus place the claim wholly outside the statutory bar, and there must be a new trial, and it is so ordered.

Let this be certified.

Error.

Venire de novo.

 PATRICK V. MOREHEAD.

(85 N. C. 62.)

Will — construction — rule in Shelley's case.

A testator devised lands to his grandson James, "to hold during his life-time," and if he should have heirs, "to them or any of them that he may think proper," and if he should die without issue, "for the land to be equally divided among all my grandchildren." At the testator's death James was unmarried, but he afterward married and had children. At the date of the will the testator had other grandchildren. *Held*, that James took only a life estate, and the remainder vested in his children in fee. (*See note, p. 668.*)

CONSTRUCTION of a will. The head note and opinion states the case. The defendant had judgment below.

E. S. Martin, for plaintiffs.

ASHE, J. This case comes up by appeal from a judgment rendered in the court below on a statement of facts agreed upon by counsel in a controversy submitted without action. The statement contains the following clause in the last will and testament of James Patrick, Sen., namely: "I give to my grandson, James D. Patrick, the plantation known as the old 'Iron Works,' containing about eight hundred acres of land, to hold during his life-time, and if it

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shall so happen that he has any lawful heirs, I give it to them or any of them that he may think proper ; and should it so happen that he dies without any lawful issue, for the land to be equally divided between all my male grandchildren.”

The plaintiffs claim that James D. Patrick, their father, under the third clause of his grandfather's will, took a life estate in the land, and they, the remainder in fee simple after his death ; and that the sheriff's deed to Morehead and Gilmer conveyed only the interest of James D. Patrick, which terminated at his death on the first of May, 1879. The defendants on the other hand resist this construction of the will, and claim that James D. Patrick by the devise to him acquired an absolute estate in the land, and that they as heirs of James T. Morehead, deceased, have the fee simple title. And we are now called upon to determine the true construction of the above recited clause in the will of James Patrick, Sen., and to decide whether James D. Patrick took thereby an estate in fee simple or only an estate for life with remainder to his children or descendants.

It is the well-settled rule in the judicial construction of wills, that the intention of the testator shall prevail unless it contravenes some established principle of law. It is therefore our duty to ascertain what the intention of the testator was, and to effectuate that intention if warranted by law in so doing.

There perhaps is no branch of the law that has given rise to more conflicting decisions, or a greater display of legal learning, than the application of the rule in Shelley's case to the construction of deeds and wills. But fortunately in this case we are not compelled to grope our way through the mist with which the subject has been enveloped by the many clashing decisions, to reach what we conceive to be the correct interpretation of the will under consideration. A few decisions of our own court, with some others, lead, we think, to a satisfactory solution of the question.

It has been settled, upon unquestionable authority, that if an estate be given by will to a person generally with a power of disposition or appointment, it carries the fee ; but if it be given to one for life only and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life.

In the case of *Jackson v. Robins*, 16 Johns. 537, the court say : “ We may lay it down as an incontrovertible rule that where an estate is given to a person generally or indefinitely with a power of

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disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposition. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion."

In this State in the case of *Alexander v. Cunningham*, 5 Ired. 430, which was a petition for dower, depending upon the construction of a will which read, "I will to my son, M. W. Alexander, all my estate, real and personal, for his use and benefit and then to be divided off and distributed among his children, as he may think proper, that is to say, my land to be used by him and the profits thereof to be to him, but the land to be by him divided and distributed as he may think proper," Chief Justice RUFFIN in delivering the opinion of the court, said: "We are of the opinion that the son took but an estate for life, with the power of dividing the land and the other property within his life-time or at his death among his children as purchaser from the testator; and that until such an appointment, the remainder in fee either vested in the children, or descended to the heirs of the testator. It is very clear that where there is an express estate for life to one, and a power to him to appoint the estate among certain persons, the first taker gets but an estate for life." Same principle in Sugden on Powers, 15 Law Lib. 66; *Bass v. Bass*, 78 N. C. 374.

It is true the word employed in the will in *Alexander v. Cunningham* was "children," but that does not affect the appositeness of the authority, for it is evident the testator in this will did not use the words "lawful heirs" in their technical sense, but as synonymous with issue or children. The father, the brothers and sisters and aunt of James D. Patrick were all alive at the date of the will. Several of them were the objects of the testator's bounty. He knew if James D. died immediately after the publication of his will that his brothers and sisters would be his heirs, and the very male grandchildren, to whom the estate was devised in the event of James D. Patrick's dying without issue, would have been his heirs, if all others standing in nearer degree had died before him. If he meant heirs-general, why say "if it should so happen that he has any lawful heirs," etc., knowing at the time that the persons were then living who must be his lawful heirs, in the event of his dying, and that he must continue to have such heirs, so long as those to whom

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the land was limited in remainder continued to live? The words "if it shall so happen," etc., refer to the future, not to the class of heirs the devisee then had, but to a class yet to come into existence, and who could only be composed of his lineal descendants. If this be so, and we think it is too plain to admit of controversy, then the will should be construed as reading, I give unto my grandson, James D. Patrick, the plantation, etc., to hold during his lifetime, and if it should so happen that he has any heirs of his body, I give it to them, or any of them that he may think proper, etc. And if the devise had stopped with the words "I give it to them," it would have been a case clearly falling within the rule in Shelley's case, and by operation of the act of 1784, the defendants would have a title in fee simple. But the super-added words "or any of them that he may think proper," have an important bearing upon the question of interpretation, and we think prevent the application of the rule.

In *Allen v. Pass*, 4 Dev. & Bat. 77, Judge GASTON used the following language: "Before the application of the rule in Shelley's case it is always proper first to ascertain whether, on the true interpretation of the words of the gift, there is a limitation of the inheritance in remainder to the heirs, or to the heirs of the body, of one to whom a precedent estate is given—such a limitation does exist when the limitation is to them in the quality of heirs—embracing the same number—in succession of objects and conferring the same extent of interest, as would be embraced and conferred when the inheritance has been limited to the ancestor." He proceeds to say that when these requisites are embraced in the terms of a devise the rule in Shelley's case applies. But he adds: "On the other hand, as the law will not entrap men by words incautiously used, if in the limitation of a remainder by any instrument of conveyance, the phrase heirs or heirs of the body be expressed, but it is unequivocally seen that the limitation is not made to them in that character, but simply as a number or class of individuals thus attempted to be described, then the whole force of the phrase is restricted to this designation or description—it shall have the same operation as the words would have, of which it is the representative; there is not in fact a limitation to heirs, and of course there is no room for the application of the rule."

And in the more recent case of *Ward v. Jones*, 5 Ired. Eq. 400, Chief Justice PEARSON says: "The rule in Shelley's case only applies

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where the same persons will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent, it being more favorable to dower, to the feudal incidents of seignories, and to the rights of creditors, that the first taker should have an estate of inheritance; but where the persons taking by purchase would be different or have different estates, then they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills take as purchasers."

In our case it was by no means certain when the will was made, whether one or more or all of the issue which Jas. D. Patrick might happen to have would take the estate. It was in his power, if he would have, as he did, more than one child, to give the land to one of them; and that one would not have taken the same estate which he would have taken if the land had come to him by descent, for in the latter case he would have taken as tenant in common with his brothers and sisters, but as appointee the whole estate would have vested in him; and we do not conceive that it can make any difference that the power has not, in fact, been exercised. It is the existence of the power that affected the quality of the estate. It could not be foreseen whether it would be exercised or not, but it was enough to prevent the application of the rule, that the limitation to the heirs of the devisee was coupled with a power, the exercise of which would prevent them from taking the same estate they would have taken if the land had come to them by descent from him.

Upon the authorities above cited and the deductions we have drawn from them, we are of opinion that the judgment rendered in the court below was erroneous and that the plaintiffs are entitled to the land described in the pleadings in fee simple. The judgment of the Superior Court of Rockingham is therefore reversed and judgment must be rendered in this court in behalf of the plaintiffs.

Error.

Judgment reversed.

NOTE BY THE REPORTER.—In *King v. Ulley*, 85 N. C. 59, a testator devised lands to his daughter "for her natural life, and after her death, I give the same to her heirs forever." Held, that the daughter took an estate in fee. The court said: "The words employed are clearly and directly within the rule established in *Shelley's* case, and which has been repeatedly recognized as the common law in force in this State. The rule is in substance that when a freehold is given to one, and by the same gift a limitation is made to his heirs or the heirs of his body, the inheritance vests in him and not in his heirs. 1 Co. 98; 2 Jarm. on Wills, 178; O'Hara on Wills, 92; *Folk v. Whittly*, 8 Ired. 183; *McBee ex parte*, 68 N. C. 338; *Coon v. Rice*, 7 Ired. 217; *Worrell v. Vinson*, 5 Jones, 91."

See *Reinders v. Koppelman*, 68 Me. 482; s. c., 30 Am. Rep. 802; *Jones v. Bacon*, 68 Me. 34; s. c., 28 Am. Rep. 1.

Hauser v. Tate.

HAUSER V. TATE.

(85 N. C. 81.)

Bank — illegal — personal liability of president.

One who assumes the presidency of a bank without legal organization, is responsible for losses incurred by third persons in its management by the subordinate officers although he supposed the bank was legally constituted, was ignorant of its condition, and did not actively participate in its management.

ACTION to enforce individual liability of a bank president. The opinion states the case. The plaintiff had judgment below.

Clement, McCorkle and Watson & Glenn, for plaintiff.

Jones & Johnson, Henderson, Buxton and Folk, for defendant.

SMITH, C. J. The act of the general assembly granting a charter to the bank of Statesville, ratified and taking effect from March 22, 1870, with a capital stock not to exceed \$500,000, divided into shares of \$100 each, authorized an organization when 200 shares were subscribed and the money paid, and the election of a board of directors to hold office for one year, and who should choose a president thereof.

Under the supervision of C. A. Carlton, one of the five designated commissioners, a stock subscription book was opened, in which are entered the name of R. F. Simonton as a subscriber for 180 shares, and the names of H. Reynolds, C. A. Carlton, A. M. Powell and Samuel McD. Tate, for five shares each. The signatures of Simonton and the defendant were genuine. Carlton denied any authority to sign his name or to bind him therefor. The name of Reynolds, since deceased, is not in his proper hand. The shares taken by Powell and the defendant were, on March 27, 1871, the day of making the subscription as the defendant testifies, transferred to the said Simonton in the same book, after many intervening blank pages. There was no proof of the amount and kind of funds paid in upon the subscriptions or of any organization under the act, or of the election of directors or other bank officers previous to the assumption and exercise of the corporate rights conferred, and the bank commenced operations under the agency of Simonton pro-

fessing to be the cashier, and the presidency of the defendant as communicated to the public in advertisements and printed letter-heads, and in direct correspondence with one of the banks in New York, to whom was furnished the genuine signature of both of these officers, with their full consent. The plaintiff, with the assurance that the bank was operated and managed under the control of the persons thus designated as president and cashier, both men of prudence and financial skill and experience as well as of high repute for integrity, deposited at different times sums of money which have been lost by mismanagement and disasters, and for the recovery of which in this action he seeks to charge the defendant personally.

The gravamen of the complaint is that there was never any proper organization under the charter, and the bank having no legal corporate existence, its name was assumed by said Simonton and his personal banking transactions conducted thereunder, in silent if not active co-operation with the defendant, and that the association of them in imposing upon the public a fraudulent, as and for a regular and real banking company, and thus securing and abusing the plaintiff's confidence to his injury and loss, renders each personally and equally exposed to his demand for redress.

These are the general facts which the plaintiff proposed to establish and in support of which much evidence was offered, and upon which depends the admissibility of such as was the subject of exception during the progress of the trial and is set out in the transcript.

The plaintiff alleges that the defendant, owning no stock, and assigning that entered in his name, in permitting himself to be held out as the president and principal officer of a spurious banking institution, and thus giving it a personal sanction and credit, was in law, with or without any explicit knowledge or information of the manner in which its affairs were conducted, a participant with Simonton, the principal actor, in imposing it upon the public as real and trustworthy, and equally answerable to creditors, their relations to the public, although not *inter se*, being those of partners or *quasi* partners.

The evidence offered and received after objection rests upon the support of this hypothesis, consisting of printed letter-heads used in correspondence, declarations of Simonton, and letters written by him in his capacity of cashier in the bank business, letters

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copied from the press after notice to produce the originals addressed to him, his own letters to Simonton and the stock subscription book. The competency of most of this evidence depends upon the foundation laid for its introduction in the proof of the personal relations subsisting between them and their co-operation in getting up and carrying on the banking business, and its effect must be judged of by the jury in passing upon the existence of the confederate relations between them.

“The president is usually expected,” says a standard authority, “to exercise a more constant, immediate and personal supervision over the affairs of the bank than is required from any other director.” *Morse on Banks*, 128.

“Bank directors are not mere agents, like cashiers, tellers and clerks. It is the duty of the board to exercise a general supervision over the affairs of the bank and to direct and control the action of its subordinate officers in all important transactions. * * * * They invite the public to deal with the corporation and when any one accepts the invitation, he has the right to expect reasonable diligence and good faith at their hands, and if they fail in either they violate a duty they owe not only to the stockholders but to the creditors and patrons of the corporation.” *United Society v. Underwood*, 9 Bush, 609.

“The directors of a banking or other corporation are, in the management of its affairs, only trustees for its creditors and stockholders and are bound to administer its affairs according to the terms of its charter and in good faith. If they fail in either respect, they are liable to the party in interest who is injured by it, for a breach of trust, and may be made to account with him in a court of chancery.” *Bank v. St. John*, 25 Ala. 566.

Carrying the principle still farther, VALENTINE, J., delivering the opinion of the court in *Bank v. Wulfekuhler*, 19 Kans. 60, uses this language: “While we assume as a matter of fact that the defendant knew nothing of the condition or management of said bank and nothing of the condition of Herman’s account with the bank, yet still as a matter of law, we must presume that he knew all about these matters. He was a director and the vice-president of the bank, and it was his duty to have such knowledge, and therefore the law will conclusively presume that he had it.”

[Omitting a point of evidence.]

To the suggestion that the defendant did not supervise the opera-

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tions of the bank and knew nothing of its condition, the answer is obvious that he voluntarily assumes a position the obligation of which demands this of him, and persons dealing with the bank may reasonably expect his faithful discharge of that obligation, and if he bestows no attention on the business, it is his own neglect from which others should not suffer. But the prominent feature in the transaction is his assenting to be held out to the world as the chief officer of a corporation which has no legal being, and of which, if he had not, he ought to have had, knowledge before lending his name in furtherance of its object.

The instructions to the jury in our opinion properly presented the question of the defendant's liability, and is in harmony with the views already expressed. Nor can the defendant complain of the refusal to charge that such liability did not exist if the defendant supposed himself to be the president of a legally constituted bank. His assumption of the office of president is a positive act, the consequences of which he cannot evade by his failure to inquire into the existence and character of the organization of which he becomes the head. This is equivalent to a direct indorsement, challenging the confidence of all, who knew of his own superior business qualifications, in the institution supposed to be under his care.

It is not an act of good faith to accept the place with its attendant responsibilities without making the proper inquiries, and thus knowing the real condition of this patronized applicant for public favor and for business, and the publication of his name with his concurrence is a direct sanction to the enterprise itself.

[Omitting a question of damages.]

There is no error, and the plaintiff will have judgment for the residue and unremitted part of the verdict.

No error.

Judgment affirmed.

RIGGS V. ROBERTS.

(85 N. C. 151.)

Bankruptcy — discharge — new promise

To revive a debt discharged in bankruptcy, there must be a distinct and specific promise. A mere acknowledgment of the debt, although implying a promise to pay, is not sufficient.*

* See to same effect, *Shockey v. Mills* (71 Ind. 288), 36 Am. Rep. 196.

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ACTION on a bond executed by defendant's intestate. Defense a discharge in bankruptcy. Evidence was introduced or offered of declarations by the deceased that he had let the plaintiff have a cow and a calf in part payment, and expected to pay every debt he owed; and had asked the plaintiff if he would take a certain tract of land for what he owed him; and had said he was indebted to the plaintiff and expected to pay him out of some land. The plaintiff was nonsuited.

D. G. Fowle, for plaintiff.

J. W. Graham, for defendant.

SMITH, C. J. [Omitting consideration of the statute of limitations.] But if the statute were put out of the way, the discharge under the decree in the bankrupt court remains an unsurmounted barrier to the maintenance of the action.

In order to its removal the promise, though not required to be in writing, must be "distinct and specific," and "a mere acknowledgment of the debt, though implying a promise to pay," in the language of the court in *Kirkpatrick v. Tattersall*, 13 M. & W. 765, and as approved and repeated in *Fraley v. Kelly*, 67 N. C. 78, "would amount to no more than an account stated, and though in writing would be a promise which the certificate would bar."

So Lord ELLENBOROUGH instructed the jury: "You ought to be satisfied that the defendant made a distinct, unequivocal promise to pay, before he is placed again in the responsible situation from which the law has discharged him." *Fleming v. Hayne*, 1 Stark. 370; *Henly v. Lanier*, 75 N. C. 172.

The vague and indefinite language imputed to the intestate, would hardly be deemed sufficient to repel the statute before the reviving promise was required to be in writing, under the ruling in the case of *Faison v. Bowden*, 72 N. C. 405, where the deceased testator had said to the plaintiff, his attending physician, to whom he was largely indebted for professional services, "I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I have now for building, and it will do you more good to get it in a lump." This was held to be insufficient to repel the plea, and the court say: "The rule to be gathered from the numerous cases to which we were referred by the counsel may be thus expressed — 'the new promise must be definite and show

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the nature and amount of the debt, or must distinctly refer to some writing or to some other means by which the nature and amount of it can be ascertained. Or there must be an acknowledgment of a present subsisting debt from which a promise to pay such debt may be implied,' and it is added, 'there is nothing in the conversation given in evidence which would enable any one to ascertain its amount.'"

But a more distinct promise is required to deprive a bankrupt of the exemption secured by his certificate, and it is held by the Supreme Court of Massachusetts that even a payment of interest or principal indorsed on the note by the debtor himself is insufficient to warrant a jury in inferring a new promise to pay the residue of the debt. *Merriam v. Bayley*, 1 Cush. 77; *Cambridge Inst. for Savings v. Littlefield*, 6 id. 210. See also 1 Pars. on Cont. 381; 1 Chit. on Cont. 263.

There is no error and the judgment must be affirmed.

No error.

Judgment affirmed.

 SCOTT V. BATTLE.

(85 N. C. 184.)

Marriage — married woman's invalid deed — claim for purchase-money — betterment.

A married woman's deed, unless executed in conformity to the statute, is absolutely void; the vendee has no lien on the land for the purchase-money paid, and by her consumed, nor any right of action therefor against the woman personally; nor can he recover for his betterments, nor can innocent purchasers under his mortgage be allowed therefor except as against her claim of damages for use and detention.*

ACTION to recover land. The opinion states the case.

Davis & Cooke and Gilliam & Gatling, for plaintiff.

Bunn & Battle, for defendant.

RUFFIN, J. This cause comes here upon an agreed statement of facts in substance as follows :

See *Shivers v. Simmons* (54 Miss. 520), 28 Am. Rep. 872.

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In the year 1845, the plaintiff intermarried with one T. H. Scott, and lived with him until the year 1850, when she separated herself from him and from that time until his death, in 1876, they lived apart with the exception of one short interval—he at no time after the day of their first separation assuming any control over her property.

At the time of her marriage, the plaintiff was seized in fee of the land in controversy, and continued to possess the same until the 7th day of December, 1858, when she conveyed it to her brother, the defendant L. F. Battle, by a deed to which her husband was not a party. The deed was attested by two witnesses, and in 1872 it was admitted to probate upon the oath of one of them, and registered without her being privily examined in regard thereto.

At the time of the execution of the deed, the said L. F. Battle gave his note to the plaintiff for \$600 upon which she brought suit, and at spring term, 1870, recovered judgment for the full amount of principal and interest, and in 1871, collected the same in full and used the money.

On the 14th day of March, 1870, just after the recovery of said judgment, the defendant L. F. Battle borrowed the sum of \$3,000 of one Trevathan, and executed a mortgage upon the said land as a security therefor, and failing to pay the same, the said Trevathan sued for a foreclosure and obtained a decree under which the land in question was sold by a commissioner, when the defendants Cobb and Batchelor became the purchasers and took a deed under the sanction of the court in December, 1877.

The said Trevathan had no notice of any defect in the title of L. F. Battle at the time he took the mortgage, unless the deed which plaintiff had given to defendant Battle was notice. Neither had defendants Cobb and Batchelor notice of such defect, except such as was given to them by this action which was instituted in May, 1877, and was pending at the time of their purchase—though they and L. F. Battle had notice of plaintiff's coverture.

During the time that L. F. Battle was in possession of the land he put upon it permanent improvements.

In 1859 one W. L. Battle died, leaving a will by which he bequeathed to defendant L. F. Battle, property valued at \$10,000, and charged him with the sum of \$1,000 to be paid to plaintiff for the benefit of herself and daughters—the interest to be used in their education and the principal to be theirs at the death of plaintiff.

iff. Of the amount thus bequeathed there has been paid only the sum of \$320 in 1876, and the plaintiff has been compelled to advance her own money for the education of her daughters.

The questions submitted for the decision of the court are :

1. Is the plaintiff entitled to recover the possession of the land ?
2. If so, is she liable to a charge for the purchase-money paid her by the defendant Battle, and is the same a lien on the land ?
3. Is she liable, and the land subject to a lien, for the value of the improvements put upon it by said defendant ?
4. If so liable for purchase-money and improvements, is she permitted to use as a counter-claim the amount still due her from said defendant upon the legacy to herself and daughters ?

The plaintiff's right to the possession of the land cannot be questioned. The statute imperatively says that in order to effectually pass the estate of a married woman in lands, the conveyance must be executed jointly with her husband, and after due proof or acknowledgment thereof as to him, she shall be privily examined as to her voluntary assent thereto. Bat. Rev., ch. 35, § 14.

To properly understand the effect of these provisions, it is necessary to remember that the statute is an enabling, not a disabling one.

At common law a married woman could not by uniting with her husband in a deed effectually convey lands of which she was seized in her own right, and there was but one mode known to the law by which she could do so, to wit, by uniting with him in levying a fine. This she was permitted to do because it was supposed that the publicity of the occasion (it being done in the face of the court), and the care used by the judge to ascertain by a private examination whether her assent was freely given, afforded sufficient protection against the undue influence or authority of her husband. The statute confers upon her the power to convey by a simpler mode, but it prescribes the terms, and without their strict observance the act stands as it would at common law — absolutely null and void. The instrument executed by the present plaintiff to the defendant Battle, lacked both of the essential elements to constitute it her deed — its joint execution by the husband and her own private examination — and consequently it is wholly inoperative. *Green v. Branton*, 1 Dev. Eq. 500; *Askew v. Daniel*, 5 Ired. Eq. 321; *Kerns v. Peeler*, 4 Jones, 226; *Harris v. Jenkins*, 72 N. C. 183.

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It would seem that the same reasoning must be a full answer to the defendant's demand upon the plaintiff for the restoration of the purchase-money which she has received and used.

The incapacity of a married woman in law is not restricted simply to conveyances of her estate by deed, but extends to every contract, rendering her utterly unable to make any that can affect her estate either real or personal, except such as is technically known as her separate estate, that is, such as may have been settled upon her by express deed or other instrument.

In no case will the law imply a promise on her part, and every one who deals with her is held to do so with a knowledge of her disability.

It is this disability of a married woman to make any contract, which we think distinguished her case from those in which a purchaser under a parol contract, void under the statute, has been allowed his claim for a restoration of the purchase-money paid and compensation for his betterments. In such cases the ruling of the court has proceeded upon the idea that though the contract be void, the party making it had capacity to do so, and the very ground of the relief granted is that the vendor, by making such an agreement and thereby inducing the vendee to expend his money on the land, has obtained an unconscientious advantage which a court of equity will not permit him to use. But can this reasoning hold good when there exists, as in the case of a feme covert, no power to contract, and when indeed the law itself declares she shall not do so? We are referred however to the case of *Daniel v. Crumpler*, 75 N. C. 184, as one in which the rule just spoken of, governing parol contracts for the sale of land, was applied to such an agreement to sell by a married woman, and she was not permitted to oust her vendee until she had repaid the purchase-money and the cost of improvements. On looking to the case, the fact that the plaintiff was a married woman seems not to have been observed by the court, at least there is no mention made of that circumstance in the opinion. So far as we can see, the point passed *sub silentio*, as if it had been the case of an ordinary vendor, resting under no disability, seeking to avoid his parol agreement; and regarding the decision to be inconsistent alike with precedent and principle, we do not feel at liberty to follow it.

In the case of *Askew v. Daniel*, 5 Ired. Eq. 321, it is said that the deed of a feme covert, until she is privily examined by the

proper authorities, is mere blank paper, so utterly void, that even if it contain a stipulation in her own behalf, she cannot have the benefit thereof.

In *Green v. Branton*, 1 Dev. Eq. 500, the court say that a feme covert can be bound as to her land in only two ways, first by her deed executed jointly with her husband, with her privy examination thereto, and secondly, by the judgment of a competent court; and that if her deed be not executed as required by law, it is an absolute nullity, under which no equity whatsoever can be set up.

In 1 Bishop on Married Women, § 599, the principle is thus stated: If there is a defect in the wife's conveyance rendering it void at law, it is equally so in a court of equity, and even though the purchase-money has been paid.

In *Martin v. Dwelly*, 6 Wend. 9; 21 Am. Dec. 245; the court of errors for the State of New York held that a deed for lands executed by a married woman, but not acknowledged pursuant to the statute, was absolutely void, and was in no wise aided by the payment of the purchase-money. And so far from holding that the wife's land was subject to the lien of such purchase-money, there was a clear intimation on the part of the court that the purchaser's only chance for redress was against the estate of the husband, and leave was given him to amend his bill so as to present his demand in that shape.

The Supreme Court of Ohio, in the case of *Purcell v. Goshorn*, 17 Ohio, 105, say that no precedent can be found of a decree against a married woman to convey lands upon the ground of her having agreed to do so, whether upon a full consideration paid or not, and the fraud of the wife in the transaction can make no difference.

And this court, in the case of *Jones v. Cohen*, 82 N. C. 75, where a husband and wife disaffirmed a deed for the wife's land made during coverture, on the ground of her infancy, held that the purchase-money paid, and which had been received by the husband, was his individual debt, without once suggesting that it created any lien upon the wife's land, which was the subject of the sale.

Upon principle too it seems impossible to conceive that the law will ever permit that to be done indirectly which it forbids to be done directly, or that it will give its countenance to a doctrine which must subvert its whole theory in regard to the contracts of married women. To do so would be equivalent to saying that a feme covert cannot by express deed, unless privately examined thereto, convey

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or charge her lands, and yet may, by a mere contract to sell and the acceptance of the purchase money, create such a lien upon it as the court of equity will enforce by a sale against her will.

If this be tolerated, then the statute intended to regulate the contracts of a married woman has no longer any virtue left in it, and all the teaching of the common law as to her disability is swept away.

As to her not being privileged to commit a fraud, there can grow no fraud out of the contract of a married woman. It stands upon its own strength both in law and equity. If perfect, then well and good; if imperfect, then it is an absolute nullity, no matter upon what consideration; and as said in *Towles v. Fisher*, 77 N. C. 438, no one can reasonably rely upon the contract of a married woman, or on a representation as to her intentions, which at best is in the nature of a contract, and by which he must be presumed to know that she is not legally bound; and it is only in the case of a pure tort altogether disconnected with a contract that any estoppel against her can operate.

If in a case like the present a feme covert should retain and have actually in hand the money paid her as the consideration for her imperfect and disaffirmed contract, her vendee would be permitted to recover the same at law, or if he had converted it into other property so as to be traceable, he might pursue it in its new shape by a proceeding *in rem*, and subject it to the satisfaction of his demand. But if she has consumed it, as it is admitted this plaintiff has done, the party paying it is without remedy; and this, because of the policy of the law which forbids all dealings with femes covert, unless conducted in the manner prescribed by the statute, and which throws the risk in every such case upon the party that knowingly deals with her.

We hold therefore that the plaintiff is not personally liable to a charge for the money paid her by the defendant Battle, nor is her land in controversy subject to a lien therefor.

The question as to the improvements put upon the plaintiff's land stands, we think, upon a different footing from that concerning the purchase-money paid, and should be determined by reference, not merely to the invalidity of her contract of sale, but to the *bona fide* belief of the party making them as to the character of the title under which he held possession at the time. Admitting the plaintiff's deed to be wholly void *ab initio*, all she can ask is to get back her

own, and at its original value, together with a just compensation for its use in the meantime by way of reasonable rents. All else above this is the fruit of another's labor or money bestowed upon the premises, and she can have no claim to be enriched thereby, provided it was innocently done, and in an honest belief that the party's title to the land was good. But on the other hand, if not done *bona fide*, and the party making the improvements should know that his claim to the land was not a valid one, then the law deems it his folly, and will allow him no compensation therefor. And especially should this be so if he act knowingly under a contract which the law declares void, because against its well known policy.

As has been several times said, this equity concerning betterments is of recent growth, and it has been diversely applied by different courts according to what seemed to them to be natural equities growing out of the facts presented in the several cases; and as might be expected in such a state of things, the decisions sometimes run counter to each other, thus proving the necessity for the establishment of some fixed rules in regard to the matter, and a strict adherence to them in order that the law may be known, and the rights of parties depend thereon, and not upon the discretion of the judges and their peculiar sense of what is equitable and right.

In the very recent case of *Wharton v. Moore*, 84 N. C. 479 ; s. c., 37 Am. Rep. 627, this court took the position that the party claiming for betterments must show not only that he meliorated the land, but that he did so under an honest conviction that the land was his ; and it was there held that the constructive notice to be derived from the registration of a mortgage, was sufficient to bar the claim ; and still more plainly was this principle illustrated in the case of *Reed v. Exum*, reported in the same volume at page 430. There the plaintiff sought to avoid his deed upon the ground of duress, and was allowed to do so, but was charged with the ameliorations by which the vendible value of the land was increased, and in delivering the opinion of the court the present chief justice justifies the charge upon the express ground that it was the duty of the plaintiff to have moved promptly to have his deed vacated, and that by his not doing so, the other party might reasonably have inferred a purpose not to do it at all, and therefore might innocently and under an honest belief of title have made the improvements.

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The case of *Thomas v. Thomas*, 16 B. Monr. 420, to which our attention has been kindly directed by a disinterested gentleman of the bar, is on all fours with the present. There the land of a feme covert was sold and conveyed by the deed of herself and husband, but so imperfectly acknowledged by her as to be inoperative. The purchaser made improvements and resold to another who made additional improvements, and the question was whether the wife should account for the same. The court, being the Court of Appeals for the State of Kentucky, held that she should not account for those made by the first purchaser who had notice of the defect in his title, and could not therefore be considered as having expended his money innocently, but should account for those made by the sub-purchasers who acted under an honest belief as to the soundness of their title. This we think is the correct principle, and we have found no case in which compensation for improvement has ever been allowed to a conscious wrong-doer.

Applying this principle to the case in hand we conclude that the defendants Cobb and Batchelor cannot be allowed their claim for the improvements made upon the land in question. They have "to work out their equity" through their co-defendant Battle, and can occupy no higher ground than he did, and he was in law a trespasser at the time he made the improvements, and was known to himself so to be. The law would be unfaithful to itself to compensate a party for any loss sustained in so tortious a transaction. Still when the jury come to inquire into the plaintiff's damages on account of the use and detention of her lands, they will be at liberty, and indeed in duty bound, to make a fair allowance out of the same for improvements of a permanent character and such as she will have the actual enjoyment of. That such an allowance could properly be made by the jury was said in *Dowd v. Fawcett*, 4 Dev. 92, notwithstanding it was at the same time adjudged that the defendant's claim for improvements as such would not be recognized by the court.

This renders it unnecessary that we should determine the right of the plaintiff to use her demand for her unpaid legacy, as a defense to the counter-claim set up in the answer, and we forbear to do so though it would seem at first blush that her case comes within the rule of an equitable set-off as applied in the case of *Elliott v. Pool*, 6 Jones Eq. 42.

The judgment of this court is that the plaintiff is entitled to re-

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cover the possession of the land sued for, and that neither she nor her land is subject to any charge for the purchase-money paid or the improvements made by the defendant L. F. Battle, and to this extent the judgment of the court below is reversed.

Let this be certified to the Superior Court of Nash county to the end that the case may be proceeded with according to law.

In our discussion of this case it will be understood of course that we have been speaking throughout with reference to the law as it stood prior to the adoption of our recent marriage act.

Per Curiam.

Modified.

BANK V. ALEXANDER.

(85 N. C. 352.)

Surety—liability for amount secured by principal's assignment.

A creditor having received a portion of his claim under his debtor's general assignment, cannot afterward assert a claim for that portion against a surety for the debt.

THE opinion states the case. The court below allowed the plaintiff to prove the full amount of his claim against the estate of the defendant's testator.

Wilson & Son, for defendant.

SMITH, C. J. The partnership firm of Walter Brem & Martin, in June and July, 1876, executed five promissory notes in the aggregate sum of \$15,500 payable at 60 days to Thomas H. Brem, by whom they were indorsed to the plaintiff. The indorser died in the last mentioned month, leaving a will and appointing the defendant his executor, who having completed his administration has assets to be apportioned among the creditors and insufficient to pay in full. On November 30, 1877, the principal debtors made an assignment for the benefit of their creditors, from the proceeds of which the plaintiff has received and applied to the notes a payment of 66 per cent of the amount due. The plaintiff now proposes to prove against the testator's estate the full amount of the notes without deduction of the sum paid, and claims to share upon the basis of an unreduced debt in the *pro rata* distribution of the fund

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in the hands of the executor, upon the authority of the decision in *Brown v. Bank*, 79 N. C., 244 ; and this is the matter in contest in the action. That case furnishes no support to the present demand. There the assignors in their respective deeds conveyed property to secure the same debts, in some of which the assignors in one deed were principals and the assignors in the other were sureties ; and in the other secured debts their relations were reversed. It was held that the indebtedness was equally provided for in both conveyances, and that each contemplated a distribution upon that basis, which was not disturbed by priority in date of execution or in closing the trusts. The practical results of the two-fold assignment are thus stated in the opinion : “ The surety whose estate pays is at once subrogated to the rights of the creditor as to the sum paid, and thus the unpaid part would remain the property of the bank, and the part paid would belong to the surety. But as both principal and surety owe the entire debt to the creditor, he would be entitled also to receive the part accruing to the surety, as well as to himself out of the principal debtor’s estate.”

We discover no similarity in the cases. Here funds provided by the principal debtors, who are primarily liable, have been appropriated to their own indebtedness, nearly two-thirds of which is thus extinguished, and the estate of the testator, their surety, relieved of liability to that extent. The present contention is to revive the discharged indebtedness against the surety, for the purpose of obtaining a larger dividend from his estate. The measure of the provable debt is what remains of it unpaid, and as the discharged part could not be asserted against the principal, still less can it be against the surety upon his subsidiary liability. If the relations of the parties were reversed, and the surety had been compelled to pay the debt, he would thus become himself a creditor by virtue of an equitable assignment or right of action for money paid. But there is no analogy in the cases, and we can see no ground upon which the present claim can stand.

There is error in the record and the judgment will be entered here according to the case agreed, that the defendant go without day.

Error.

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Judgment reversed.

Dorsey v. Allen.

DORSEY v. ALLEN.

(85 N. C. 358.)

Nuisance — planing-mill and cotton-gin — injunction.

The erection of a planing-mill and cotton-gin will not be enjoined, at the suit of one dwelling in the vicinity, on account of the anticipated noise and increase of peril by fire. (*See note, p. 707.*)

MOTION for injunction. The opinion states the case. The motion was refused.

Edwards & Batchelor, for plaintiffs.

W. H. Young, for defendant.

SMITH, C. J. The defendant having begun the erection of the necessary buildings for a planing-mill and cotton gin, to be operated by steam on his lot adjoining that owned and occupied by the plaintiffs as their place of residence, this action is instituted to arrest the further prosecution of the work upon the ground mainly that the proposed use of the houses when completed will expose their premises to increased perils of fire, and that the noise from working the machinery will render their dwelling uncomfortable and unfit for a residence. The complaint invokes the exercise of the restraining power of the court in this early stage of the enterprise, and insists that the defendant should build upon the rear part of his lot, where there is ample space equally convenient and accessible, and thus avert the apprehended danger of fire, and lessen, if not remove the annoyance occasioned by the operations carried on in the mill and gin house through the agency of steam power. The plaintiffs state that a division fence nearly eight feet high separates the respective lots, from which the defendant's buildings are removed but about nine feet; that the planing-mill and gin house are 111 feet apart, the first being 118 feet and the latter 39 feet from their kitchen, and respectively 170 and 67 feet from their dwelling, all the structures being of wood.

Numerous affidavits were produced and read upon the application for a preliminary restraining order, upon the examination of which we find no reasons for a dissent to the conclusion reached by his

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honor upon the hearing. Much of the testimony and largely that of the plaintiffs express the apprehensions entertained by the witness as to the probable effects of the works when in full operation, in the disturbing noise produced and the increased perils of fire, and the consequent impairment in value of the plaintiffs' premises as a residence. Other testimony is as to the public convenience to be subserved by the additional means of ginning provided, and the public needs of the mill in furnishing building materials required in the thrifty and rapidly improving town in which it is located. Many of the witnesses say that the noise and disturbance of trains running on the railroad track, from which the plaintiffs' dwelling is distant forty yards, by night and day greatly exceed any caused by the defendant's operations, and while there is a concurrence in the opinion that these erections may become annoying and a source of discomfort to the plaintiffs and their family, rendering their residence less desirable and of less market value as such, the preponderance is greatly in favor of the public advantages to be derived from both establishments.

Some of the witnesses, and among them the defendant's engineer who has charge of the engine and is superintendent of the business, testify to the superior character of the machinery and the careful provisions against accidents, and say that very little noise is made by the running of the engine and gin, which then had been in use several days.

We reproduce these leading features in the testimony to show that while the buildings erected for the purpose of dressing timber and ginning cotton, by the motive power of steam, are not necessarily nuisances but may become so under some circumstances, to be determined by the jury, it was eminently proper in the judge to decline to interfere in the case before him and stop the progress of the work, before the question of nuisance has been or could be decided.

Nor was it necessary, for before operations were commenced there was no increased danger from fire, and no disturbing noise made requiring judicial interference, and the relief could be obtained after the results were definitely ascertained if the plaintiffs should be found entitled to it.

The nuisance if incidental and not necessary to the proper conduct of the business, or inherent and inseparable from it, could then be abated, and the defendant's knowledge of the pending suit

would take from him all just cause of complaint when it should be so adjudged. But it would be an unwise exercise of power, upon such uncertainty as to the practical working of an undertaken enterprise, and its consequent effects, for the court to interpose and prevent its being carried out with its promises of substantial and lasting benefits to a community, because of the discomfort and inconvenience a single family or a small number of persons may experience from its presence in their vicinity, so inconsiderable when weighed in the scale with the public interests.

While it is true that a business lawful in itself may become so obnoxious to neighboring dwellings as to render their enjoyment uncomfortable, whether by smoke, noxious and offensive odors, noises or otherwise, and justify the protecting arm of the law, yet there must be the ascertained and not probable effects apprehended. When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will refrain from interfering.

“When an injunction is asked,” says a recent author, “to restrain the construction of works of such a nature that it is impossible for the court to know until they are completed and in operation whether they will or will not constitute a nuisance, the writ will be refused in the first instance.” High on Injunction, §§ 488 and 489, note 1.

So too this extraordinary remedy of prevention will not be granted unless it shall appear that the aggrieved party has no adequate redress or reparation for his injury in an action or in a succession of actions for the recovery of damages. 2 Black, 545. “Where the injury is irreparable,” declares Mr. Justice STORY, “as where loss of health, loss of trade, destruction of the means of subsistence or permanent ruin to property may or will ensue from the wrongful act or erection, in every such case, courts of equity will interfere by injunction in furtherance of justice and the violated rights of property.” Eq. Jur., § 926.

In like manner GASTON, J. remarks, delivering the opinion in *Barnes v. Calhoun*, 2 Ired. Eq. 199, “but it (a court of equity) will only act in a case of necessity when the act sought to be prevented is not merely probable but undoubted, and it will be particularly cautious thus to interfere when the apprehended mischief is to follow from such establishments and erections, as have a tendency to promote the public convenience.”

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“It is settled in respect to private nuisances,” remarks MANLY, J., delivering the opinion of the court in the case of “*Ellison v. Commissioners*, 5 Jones Eq. 57, the purpose of the complainant in which was to restrain the corporate authorities of the town of Washington from making use of a lot adjoining his own residence, as a place of burial for the dead, “that when the nuisance apprehended is dubious or contingent, equity will not interfere, but will leave complainant to his remedy at law?”

“If a man,” says PEARSON, C. J., in *Hyatt v. Myers*, 73 N. C. 232, “instead of contenting himself with the quiet and comfort of a country residence, chooses to live in a town, he must take the inconveniences of noise, dust, flies, rats, smoke, soot and cinders, etc., and he cannot complain of the owner of an adjoining lot, by reason of smoke, soot and cinders (the subject of complaint in the case) caused in the use and enjoyment of his property, provided the use of it is for a reasonable purpose, and the manner of using it is such as not to cause any unnecessary damage or annoyance to his neighbors.”

We subjoin some additional references furnished by the researches of defendant's counsel in confirmation of what has been said. *Simpson v. Justice*, 8 Ired. Eq. 115; Wood on Nuis., §§ 788, 789, 791, 792; *Eason v. Perkins*, 2 Dev. Eq. 38; *Wilder v. Strickland*, 2 Jones Eq. 386.

For these reasons it must be declared there is no error in the refusal of the restraining order and this will be certified.

No error.

Judgment affirmed.

NOTE BY THE REPORTER.—See, to the same effect, *Shiras v. Olinger*, 50 Iowa, 571; s. c., 32 Am. Rep. 138.

In *Whittaker v. Hudson*, 65 Ga. 43, the complainant alleged that the defendant had commenced the erection of a blacksmith shop within seventy-five feet of his dwelling-house, without a necessity therefor, as he now has and owns another in the same village; that it is done to annoy and worry him and his family, and to force upon him the purchase of the land upon which it is to be erected, at double the real value thereof; and that the shoeing of horses, shrinking of tires, the unhealthy and disagreeable smoke issuing therefrom, the noise from the blowing of bellows, two of which are to be used, the hammering on the anvils, the obstruction of his view to the street, and the danger from fires, all conspire to make the same a nuisance by reason of its location, and the effect in diminishing the value of his residence, the injury to himself and family in their comfort and happiness, as well as the inevitable loss of his wife's health. Wherefore he prayed an injunction against the erection of the said blacksmith shop.

The defendant answered the bill denying the purpose and intent attributed to him, and alleging that the lot is worth the money asked for it; that the same was its reasonable market value; that it would not endanger the complainant's house from sparks or fire, as he intended to have forges of stone or brick, with proper arches, flues and bonnets on the

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tops; that he only intended to work for the public, and not to annoy or affect the health or comfort of complainant's wife or family; that the shop does not obstruct the view from complainant's house; that he does own another shop, but it is beyond the railroad depot, and inconvenient for his customers.

The court below having granted the injunction, the court in review said: "Whilst we are prepared to hold that a blacksmith shop is not a nuisance *per se*, yet as there may be circumstances in which it could be shown that it was, we are not prepared to hold, on the other hand, that in no case can it be shown by proof that it was in fact a nuisance. The granting of this injunction by the chancellor shows that the evidence, in his opinion, preponderated in favor of the complainant, and that he would allow a jury to pass thereon, and therefore we will not interfere with his judgment. And we will add, that if he had refused it we should not have reversed it, but would have allowed the case to have gone before the jury under the law, and let it be ascertained upon the trial whether, in the enjoyment and exercise of a clear legal right, which is not declared by the law or the courts to be a nuisance *per se*, it is possible that it may be so used as to become a legal injury and an infringement on the legal rights of others, and therefore a nuisance."

GWYN V. RICHMOND & DANVILLE RAILROAD COMPANY.

(85 N. C. 429.)

Agency — sale — delivery to carrier — stoppage in transit by agent — usage.

The owner of cotton in the hands of his agent sold it, and the agent at his direction delivered it to a carrier, taking a shipping receipt, in the name of the principal, conditioned for the delivery of the cotton to the purchaser. The agent retained the receipt, and his draft on the purchaser for his advances to the owner on the cotton having been refused, he demanded and received back the cotton from the carrier. *Held*, that the purchaser could recover therefor from the carrier.

ACTION for the value of a quantity of cotton. The opinion states the case. The plaintiff had judgment below.

Armfield, Folk and Cilley, for plaintiffs.

Reade, Busbee & Busbee, for defendants.

SMITH, C. J. On March 10, 1880, J. P. Harper, one of the plaintiffs acting for the plaintiff firm, bought from McAuley & Meacham, at Charlotte, forty-nine bales of cotton of which twenty were then in possession of their agents, Neely & Bro., at Linwood, on the line of the defendant's road, and paid for the same. By direction of the vendors, Neely & Bro. on the next day delivered the cotton to the defendant company, taking therefor a shipping receipt in the name of their principals for the transportation and

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delivery of it to the plaintiffs at Icard, a station on the Western North Carolina railroad. The receipt was retained and at the same time Neely & Bro. drew on the said McAuley & Meacham for a sum over \$700, a balance due for moneys advanced in their purchases of cotton. Receiving a telegram from the latter that the draft would not be paid, M. Neely pursued and overtook the cotton at Salisbury, and presenting the receipt to the defendant's agent at that place with a demand for a re-delivery, was allowed to take it from the custody of the company and afterward converted it to his own use.

M. Neely testified that there was "a universal custom among cotton buyers, when they had not been paid in full for their advances, upon shipping cotton, to hold on to the bill of lading as evidence of their title."

The defendant requested the court to instruct the jury :

1. That if the custom testified to prevailed, and McAuley & Meacham were indebted for moneys so advanced by their agents, the latter had still a lien on the cotton and a right to resume possession from the defendant.

2. That the existence of this usage put the plaintiffs upon inquiry as to the lien, and there was no evidence of their having made such inquiry.

The court charged that when the defendant signed the bill of lading it undertook to carry safely and deliver the cotton to the plaintiffs at Icard, and failing to do so, is liable unless some sufficient excuse is shown; that the contract of the plaintiffs with McAuley & Meacham vested in the former such title as the latter had in the cotton; and that while M. Neely & Bro. could retain possession until repaid their advances, yet when they marked the bales with the plaintiffs' name and transferred them to the custody of the defendant for carriage and delivery to the plaintiffs at the place of destination, they parted with their lien, and the plaintiffs having thus acquired full title could recover, notwithstanding the vague and indefinite custom governing the dealings between principals and their agents as shown in evidence.

The law applicable to the facts of the case has been, in our opinion, correctly explained in the instructions to the jury. The sale of a specific chattel by words operating *in presenti* transfers the vendor's title to the vendee, with a right to retain possession until the purchase-money is paid, in the absence of any contrary intent

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expressed or implied. When the purchase-money is paid the title vests absolutely in the purchaser, and a right to immediate possession. Hilliard on Sales, §§ 2 and 4; *Jenkins v. Jarrett*, 70 N. C. 255. So a delivery of goods, bought and paid for, to a carrier for transportation and delivery to the purchaser, is a delivery to the purchaser himself. The carrier is in such a case the vendee's agent to receive and accept the goods. Hilliard on Sales, § 42.

The authorities are numerous, say the court, in *Ober v. Smith*, 78 N. C. 313, "to the effect that a delivery of goods to a carrier designated by the purchaser is of the same legal effect as a delivery to the purchaser himself, and that it is not necessary that he should employ the carrier personally or by some agent other than the vendor," and the same result follows when the mode of transportation is the usual or only one existing. It is equally true that the agent's right to retain until reimbursed what he may have paid out for his principal in purchasing the goods, may be surrendered and lost by his execution of his principal's contract of sale in making a delivery to the vendee.

A lien is defined to be "a right to hold possession of another's property for the satisfaction of some charge upon it." 3 Pars. on Cont. 234. The right of lien cannot exist without possession and is an inseparable incident to possession. The surrender of the one is the extinction of the other, and this applies with greater force when the surrender is to a purchaser from the vendor against whom it exists in favor of his factor. Hill. on Sales, ch. 16, p. 198.

The bill of lading itself executed to the vendors and acknowledging the receipt of the cotton from them to be conveyed to the plaintiffs, so far from evidence of title in the agents, shows it to be in the plaintiffs, and that the carrier's contract is in legal effect with them. The re-delivery to the agents upon their demand was a breach of the defendant's contract and rendered the company directly liable for the value of the surrendered goods.

The "usage" relied on is wholly unavailing to affect or defeat the rights of the true owners, and is foreign to issue between the parties to the action.

The doctrine of stoppage *in transitu* furnishes no analogy favoring the defendant's exemption from liability, and is but a limitation upon the general rule which deems delivery to a carrier to be delivery to the consignee purchaser. It exists only when the purchase-money has not been paid and the purchaser becomes insolvent, and

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is but an extension of the right of lien existing previous to the delivery to the carrier. The vendor is in such case permitted to regain possession before the goods reach the hands of the consignee. Actual as distinguished from constructive possession acquired by the consignee, puts an end to the right of stoppage. Hilliard on Sales, 209, 216, *et seq.* The principle governing the relations of these parties has no application to the present case.

The plaintiffs have bought and paid for the goods and the delivery vests in them the title and right of action against the defendant for the value of them.

There is no error and the judgment must be affirmed.

No error.

Judgment affirmed.

STATE V. MARTIN.

(85 N. C. 508.)

Criminal law — assault.

Defendant advanced from the opposite side of a street, some twenty steps distant, with a stick and open knife, cursing and threatening to kill the complainant. The complainant retreated into a store, and remained there two or three hours; the defendant meanwhile walking up and down in front of the store and threatening to whip him if he came out. *Held*, an assault. (See note, p. 712.)

CONVICTION of assault. The facts appear in the head-note.

Attorney-General, for State.

ASHE, J. The principle governing this case has been decided by several adjudications on the subject by this court. The principle is, that no man by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be. In the case of *State v. Shipman*, 81 N. C. 513, the defendant, after using threatening language with reference to the prosecutor and in his hearing, advanced upon him with a knife, continuing the use of violent and menacing expressions. The evidence left it doubtful as to whether or not the knife was open, and when the defendant got within five or six feet of the prosecutor, the latter said, "I shall have to go away," and withdrew from the work upon

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which he was engaged. It was held that the defendant was properly convicted of an assault. And in *State v. Rawles*, 65 N. C. 334, it has been decided that if a person be at a place where he has a right to be, and four other persons with a pitchfork, gun, etc., by following him, and using threatening and insulting language, put him in fear, and induced him to go home sooner than, or in a different way from the one he would otherwise have gone, the four are guilty of an assault, although they do not get nearer than seventy-five yards, and do not take the weapons from their shoulders. See also *State v. Hampton*, 63 N. C. 13; *State v. Church*, 63 id. 15.

There is no error. Let this be certified to the Superior Court of Burke county, that further proceedings be had according to this opinion and the law.

No error.

Judgment affirmed.

NOTE BY THE REPORTER.— See *State v. Neely*, 74 N. C. 425; s. c., 21 Am. Rep. 495. As to contingent threats: Where a man laid his hand on his sword, and said, "if it were not assize time, I would not take such language from you," held, no assault, as intent to injure was disavowed. *Tuberville v. Savage*, 1 Mod. 3. So where the defendant raised his cane, within striking distance, shook it at the prosecutor, and said, "if you were not an old man, I would knock you down." *State v. Crow*, 1 Ired. 375. So where one raised his hand against another within striking distance, and said, "if it were not for your gray hairs I would tear your heart out." *Com. v. Eyre*, 1 S. & R. 347. But where the defendant raised a weapon within striking distance, and told another to do a particular thing, and then he would not strike, and the thing was done and he did not strike, held, an assault. *State v. Morgan*, 3 Ired. 186. So where the defendant doubled up his fist at another and said, "if you say so again, I will knock you down," held, an assault. *U. S. v. Myers*, 1 Cr. C. C. 310. And so where one within striking distance of another clenched his right hand, his arm being bent at the elbow but not drawn back, and turning upon the other said, "I have a good mind to hit you," whereupon the other retreated, held, an assault. *State v. Hampton*, 63 N. C. 13. So where one at church drew a pistol, but did not cock nor present it, and said to the prosecutor, "we have no use for you in this company; you shall not come here; go back," and the prosecutor beginning to retire, followed him a few steps, being ten steps distant, and urged him to go off, threatening to shoot him if he did not comply; held, an assault. *State v. Church*, 63 N. C. 15.

As to the necessity for being within reach: In *Gray v. State*, 60 Ala. 66, the court said: "The first exception to the charge is to the words, 'an assault is an attempt to strike in striking distance, or shoot in shooting distance.' This is the language of some of the authorities; while others are a little more specific, and say there must be an attempt coupled with a present ability to inflict a battery. Clark's Manual, §§ 618, 619, 620, 621, 622; 2 Bish. Cr. Law (8th ed.), §§ 23, 28, 30, 31; *State v. Blackwell*, 9 Ala. 79; *Johnson v. State*, 35 id. 383; *Meredith v. State*, 60 id. 441. The word 'attempt' means, 'to make an effort, or endeavor, or an attack.' An attempt implies more than an intention formed. Some step toward consummation must be taken, before the intention becomes an attempt. Attempt to strike in striking distance, or to shoot in shooting distance, includes the intention, present ability, and some effort or endeavor to carry that intention into execution. An effort to strike, within striking distance, is an assault." Riding after a person, so as to compel him to seek shelter in a garden, has been held an assault. *Morton v. Shoppa*, 8 C. & P. 873. So where the defendant advancing in a threatening attitude, with intent to strike, so that his blow would in a second or two have reached the plaintiff, if he had not been stopped, although when stopped he was not within striking distance, held, an

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assault. *Stephens v. Myers*, 4 U. & P. 849 ; *State v. Vannoy*, 65 N. C. 532. An offer to strike by one person rushing upon another is an assault justifying self-defense, although the aggressor does not come within striking distance, if the other party has reasonable ground to believe that he will instantly receive a blow unless he defends himself. *People v. Yslas*, 27 Cal. 680.

STATE V. CHRISP.

(85 N. C. 528.)

Criminal law — nuisance — profane swearing.

Profane swearing in a public place and in the hearing of citizens, continued for five minutes, although only on a single occasion, is an indictable nuisance. *

CONVICTION of nuisance. The opinion states the case.

Attorney-General, for State.

W. C. Munroe, for defendant.

RUFFIN, J. The indictment, under which the defendant stands convicted, in effect charges that on a day certain, in the county of Greene, in the public streets of the town of Snow Hill, and in the presence and hearing of divers citizens of the State then and there assembled, and in the presence and hearing of divers other citizens then and there passing and repassing, the defendant did curse and swear in a loud voice, and did utter the profane words set out in the indictment; and did then and there and for the space of five minutes continue to utter and frequently repeat the said words in the presence and hearing of the said citizens then and there being, and passing and repassing, to their great annoyance, etc., and the common nuisance, etc.

Every intendment is to be made in favor of the verdict of the jury, and we must presume that every material allegation of the indictment was fully established to their satisfaction.

The question then arises, did the conduct of the defendant, supposing it to have been just as charged in the bill, amount to an indictable offense under the law of this State?

Under the earlier decisions of our courts, there could be no sort

* *Contra, Gaines v. State*, 7 Lea, 410.

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of doubt upon the point. In the case of the *State v. Kirby*, decided in 1809, and reported in 1 Mur. 254, the indictment charged that the defendant swore several oaths on a court-house square, to the great disturbance and common nuisance of citizens attending the court. After a submission, the defendant moved in arrest of judgment upon the ground that the facts alleged against him did not constitute an indictable offense, but the court declared that they did. The next case in point of time was that of the *State v. Ellar*, decided in 1827 and reported in 1 Dev. 267, where the indictment charged that the defendant did profanely curse and swear, in the public streets of Jefferson, to the evil example, etc.; and after a verdict for the State, he too moved in arrest of judgment upon exactly similar grounds, and his motion was allowed in the Superior Court; but upon an appeal to this court that ruling was reversed, and it was expressly declared that when the acts of profanity are so public and repeated as to become an annoyance and inconvenience to the citizens at large, no reason could be perceived why they should not be indictable as a common nuisance.

Sustained by decisions so directly to the point as these, we should feel loth to hold that the loud and continued use, even but for the space of five minutes, of profane and blasphemous language, in one of the public streets of a town, did not constitute an indictable offense under the laws of our State, unless satisfied, as defendant's counsel says is the case, that they have been overruled, either expressly or by necessary implication, in subsequent and better considered cases.

As we understand it, the position assumed by the counsel is that the use of profane language on a single occasion, however public the place, and long continued or often repeated the words may be, cannot amount to an offense cognizable in the Superior Court, but is punishable only by a penalty of fifty cents, to be imposed in a magistrate's court.

The case most pressed upon us in support of this position is that of the *State v. Baldwin*, 1 Dev. & Bat. 195, decided in 1835, and being next to those cases already cited, in the series of cases that have arisen on the point. There the indictment charged that the defendant, with others, assembled at a certain meeting-house, did loudly and profanely and in the hearing of divers good citizens of the State there assembled, curse, swear and quarrel, whereby a certain singing school there held and kept was disturbed and broken up, to

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the common nuisance, etc.; and it was held to be so defective that no judgment could be pronounced thereunder against the defendants.

As laid in the indictment, the offense consisted of a single and distinct act of cursing, without any averment that it was continued for any space of time, or that the words were many times repeated; and as it seems to us, that was the point on which the decision turned. Here is what the judge said expressly: "The act as charged is not made up of a number of acts frequently repeated. It is an act single and distinct and committed on a particular occasion." And then he adds that "it is possible that the frequent and habitual repetition of acts which singly are but private annoyances, may constitute a public or common nuisance, but if so, this frequent and habitual repetition should be appropriately charged." The stress of the opinion from first to last is laid upon the frame of the indictment, and first one of its defects and then another pointed to, and suggestions made as to how they might have been remedied. And may we not ask why all this pains was taken in the case, if it could have been disposed of by a simple declaration, that no indictment, however drawn, would lie, for that the conduct of the party did not and could not under the circumstances amount to an indictable offense? We concur with counsel to the extent that the decision made in that case goes to the length of saying that no single act of profanity is an indictable offense. But we have looked through it in vain for any support to the further proposition that the continued and public use of profane and indecent words, and their frequent repetition, though on a single occasion, may not become a common, public nuisance, cognizable in the Superior Court.

So far from that, and while conceding that certain expressions used seem to look that way, it strikes us as manifest, taking the whole of the opinion together, that Judge GASTON himself entertained no doubt but that such conduct might properly be made the subject of prosecution by indictment, provided it was charged and proved to have been so publicly committed and so long continued as to become a source of annoyance to the citizens at large.

And so it is in all the cases to which we have been referred by counsel as bearing on the point:—*State v. Jones*, 9 Ired. 38; *State v. Pepper*, 68 N. C. 259; s. c., 12 Am. Rep. 637; *State v. Powell*, 70 N. C. 67, and *State v. Barham*, 79 id. 646. These were all cases turning upon the sufficiency of the indictment, and the opinions

delivered were directed exclusively to that point; and it is a mistake made to apply what is said in the way of criticisms upon the bills to the conduct of the parties accused, and the question of their guilt or innocence.

Arguendo, in *Jones'* case, Judge NASH expressly says, that while a single act of profanity is only punishable in a justice's court, yet if the acts be so public and repeated as to become an annoyance and inconvenience to the public, they then constitute a public nuisance; without once intimating that the repetition requisite to complete the offense need be on several or distinct occasions. In *Powell's* case the indictment charged that the defendant did "publicly and profanely curse and swear and take the name of Almighty God in vain in the streets of Lumberton, to the common nuisance;" and it was held insufficient, because the court could not tell from reading it, "whether the swearing was done in a whisper or in a loud voice; for a moment or an hour; once or repeatedly; or whether heard by few or many." But the case discloses what the proof in the cause was, and that the accused had cursed so loudly as to be heard several hundred yards and from dark until eleven o'clock at night; and that the citizens in their houses and passing and re-passing the streets heard and were annoyed by him; and Judge READE, who delivered the opinion of the court, declares unhesitatingly that if the allegations of the bill had been co-extensive with the proofs, the defendant might have been properly convicted.

The conduct there held to be a nuisance differs from that charged upon this defendant and of which he stands convicted, in a single particular as to the time of its continuance; and that difference cannot involve any legal principle, but only a question as to the sufficiency of evidence.

To become a public nuisance, the conduct of a party must pass beyond the point of being injurious to individuals, and be hurtful and offensive to the community; and it may be difficult to prove that the use of profane words but for the space of five consecutive moments, could so inconvenience the community as to amount to a nuisance; yet we can suppose such cases, and surely, the fact that it may be difficult to establish an offense and punish the offender, cannot be a valid reason for relaxing the law with regard to it. But in this case, the jury have said that such was the consequence attending the defendant's conduct, and the door is therefore closed as to him, against any further inquiry into that question.

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We have gone thus at length into a review of the cases bearing on the point, notwithstanding we have so recently gone over nearly the same ground in *Brewington's* case, 84 N. C. 783, because there seems to be in some quarters an interpretation given to them which we do not think is warranted.

Thus far we have considered the case merely in the light of express authority. Finding none which we think militates against the right of the State to maintain the prosecution against the defendant, we feel at liberty to look to the well-established principles of common law as applied in other offenses, and reason from analogy.

In his commentaries on the law, Sir W. BLACKSTONE distinguishes between the absolute duties of men and their relative duties as members of society, and says that it is with respect to the latter only that municipal law assumes to control their conduct. Let a man therefore, says he, be ever so abandoned in his principles or vicious in his habits, he is out of the reach of the law, provided he keeps his wickedness to himself. But if he makes his views public, though they be such as seem principally to affect himself (as drunkenness or *the like*) they then become, by the bad example they set, pernicious to society, and it is the business of the law to correct them. Upon the strength of this authority, it is said in 1 Russell on Crimes, 270, that all open lewdness and grossly scandalous conduct is *punishable by indictment at common law*, and that whatever outrages decency, or is injurious to public morals, is a *misdemeanor*.

These principles of the common law have been everywhere recognized, and the reports of England and this country abound with cases in which, upon their authority alone, and without the aid of any statute, convictions have been enforced for offenses against public morality and decency.

In this State, by virtue of the common law simply, convictions have been had in cases of public drunkenness and the indecent exposure of the person, and their correctness have never been questioned. Why should not the same rule apply to conduct such as this defendant has been convicted of? conduct which not only wounds every sense of decency, but greatly tends to debauch and corrupt the public morals.

In the case of *Brewington* just referred to, we held the use of

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profane and vulgar words, in a public place on several occasions, whereby the public at large were offended and annoyed, amounted to a public nuisance. We now hold that the use of such words, on a single occasion, may do the same provided it be attended with like consequences.

No error.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

SCOTT V. PORTER.

(98 Penn. St. 88.)

Bankruptcy — "fiduciary character" — factor.

A debt for money due from a factor to his principal is not created while acting in a "fiduciary character," and is discharged in bankruptcy. (*See note, p. 722.*)

CASE for moneys had and received. The opinion states the point. The plaintiff had judgment below.

Henry J. Scott and William Henry Peace, for plaintiffs in error.

L. C. Cleemann, for defendant in error.

TRUNKEY, J. The first section of the Bankrupt Law of 1841 provided, that all persons "owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity," should be discharged on a compliance with the requisites of the statute. Upon the point, whether a factor, who retains the money of his principal, is a fiduciary debtor within that act, it was thus interpreted: "If the act embrace such a debt, it will be difficult to limit its application. It must include

all debts arising from agencies ; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian or trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not therefore within the act." *Chapman v. Forsyth*, 2 How. 202.

The provision of the Bankrupt Act of 1867 is that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act." If the word "fiduciary" in this act be not construed as it was in the former, it will be as difficult to limit its application as it would have been under the act of 1841, had it not then been confined to technical trusts. Words and phrases, the meaning of which in a statute has been ascertained, are, when used in a subsequent statute, to be understood in the same sense. Potter's Dwar. Stat. 274, and cases cited in note ; *McKee v. McKee*, 17 Md. 352 ; *Cronan v. Cotting*, 104 Mass. 245 ; s. c., 6 Am. Rep. 232. The well-considered opinion in *Cronan v. Cotting* is persuasive, if not conclusive, that the word is used in the same sense in the act of 1867, as in the prior statute. Referring to the reasoning of Judges BLATCHFORD and NELSON of the United States District and Circuit Courts in New York, who decided that the word was used in a different and more extensive sense in the latter act, it is said: "On the contrary, it appears to us that the inference is quite as legitimate that Congress omitted the enumeration of specific trusts for the very reason that the term 'fiduciary capacity' had, by judicial construction, received a fixed definition ; and with intent that the phrase should carry that definition into the new act. The specific enumeration was omitted because all were included in the general expression, 'fiduciary.' The association of those specific trusts originally was held to be an indication of intent in the general purpose. That intent, having

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been ascertained, has been affixed to the general term, and become legal construction."

In *Neal v. Clark*, 5 Otto, 704, the court say, quoting *Chapman v. Forsyth, supra*, a like process of reasoning may be properly employed in construing the corresponding section of the act of 1867; and conclude "that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." This accords with the view before taken in *Cronan v. Cotting*, namely, that if the phrase, "while acting in any fiduciary character" be referred to that which immediately precedes, it implies something in the nature of defalcation; and if to the first branch of the section, its association with fraud and embezzlement—fraud involving moral turpitude or intentional wrong, as does embezzlement—carries the implication of a debt arising from breach of a technical trust, and not one which the law implies from the contract. What was said in reference to the interpretation of the word "fraud" may be said of the interpretation of the phrase, "while acting in any fiduciary character," by the Supreme Court of Massachusetts, to-wit: "Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system."

We repeat the remark in *Curtis v. Waring*, 92 Penn. St., 104; that for reasons given by WELLS, J., in *Cronan v. Cotting*, we conclude, that section 5717, Rev. Stat. U. S., was intended to have the same meaning which the Supreme Court of the United States had put upon the similar clause in the Bankrupt Act of 1841.

[Omitting a question of form of action.]

The only question is whether a factor is one acting in a fiduciary character in the intendment of the Bankrupt Law? We think it was error to so hold.

Judgment reversed, and now judgment for the defendant below on demurrer.

Judgment reversed.

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NOTE BY THE REPORTER.— It may be worth while to group the recent cases on this point, and compare them.

The language of the Bankrupt Act of 1841 was, "debts created in consequence of a defalcation as a public officer or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." The language of the act of 1867 is, "debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character," etc. It seems difficult to distinguish between the two forms of expression.

Under the act of 1841, the United States Supreme Court held, in *Chapman v. Forsyth*, 2 How. 202, a case of a factor, that the words "fiduciary capacity" referred to cases of express trust, and did not include cases of mere agency. This was not based solely on the doctrine of *ejusdem generis*, but the court said: "If the act embraces such a debt it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is in a commercial sense a disregard of a trust. But this is not the relation spoken of in the first section of the act."

It is true that Judge BLATCHFORD, of the United States Circuit Court for the Southern District of New York, in *Re Seymour*, 1 Ben. 848, held the contrary under the act of 1867, observing that "the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt, and while acting in any fiduciary capacity, and not to be limited to any special fiduciary capacity." The like decision was made, founded on that case, in *Lemcke v. Booth*, 47 Mo. 325; s. c., 4 Am. Rep. 326, but without any original discussion. So also in *Banning v. Bleakley*, 27 La. Ann. 257; s. c., 21 Am. Rep. 554, founding on *Whitaker v. Chapman*, 3 Lans. 155; *Re Seymour*, *supra*; *Lemcke v. Booth*, *supra*; and *Re Kimbal*, 6 Blatchf. 292. This is a quite exhaustive review of authorities, and the court say, "The provisions of the two acts are quite dissimilar." "The factor or commission merchant receiving from the owner property consigned to him to be sold and the proceeds to be returned to the owner or kept for his disposal, we can regard in no other light than that of acting in a fiduciary capacity. The doctrine contended for, as arising from custom and usage, that the property consigned or its proceeds, become the property of the factor, for which he simply becomes the debtor of the owner, has no foundation in equity or reason." This is followed in *Deanbry v. Tête*, 31 La. Ann. 809; s. c., 33 Am. Rep. 232, but there stress is laid on the legislation of the State which "has stamped the relation of the factor with his principal with the character of a fiduciary." In *Re Kimbal*, *supra*, Mr. Justice NELSON said: "Looking at it as thus presented, it seems to me there is great difficulty in saying that the flour was not received and held by the bankrupt in a strictly fiduciary capacity. The article was placed in his possession simply to sell it and to remit the proceeds over and above his commission. The money was not the bankrupt's when it was received on the sale, but it was the money of the owner of the flour. It was a gross breach of trust to apply it to his own use. I have looked at the case of *Chapman v. Forsyth*, 2 How. 202, but do not regard it as controlling the one in hand. The provision in the present act is much broader than in the act of 1841." The same was held in *Treadwell v. Holloway*, 46 Cal. 547, in a short opinion *per curiam* without discussion, and by the Georgia Supreme Court, in an equally short and unconsidered opinion, in *Meuler v. Sharp*, 14 N. B. Reg. 492. The latter was founded on *Johns v. Russell*, 44 Ga. 460, holding that an auctioneer acts in a fiduciary character or capacity.

In *Hardenbrook v. Collson*, 21 Hun, 473, the New York Supreme Court of the fourth department decided that a debt due from a factor for goods sold on commission is created in a "fiduciary character," within the meaning of the Bankrupt Act of 1867, and is not cut off by a discharge in bankruptcy. This is based on *Whitaker v. Chapman*, 3 Lans. 155, in the same department, and that is based on *Re Seymour*, *supra*, and the omission of the specification of the particular trusts in the later statute. It claims that *Whitaker v. Chapman* is "approved" in *Birber v. Sterling*, 69 N. Y. 273, whereas it was only distinguished. It also essays to distinguish *Hennequin v. Clews*, *infra*.

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In *Fulton v. Hammond*, 11 Fed. Rep. 298, U. S. Circuit Court, Northern District of Alabama, PARDEE, Circ. J., said: "The debt of defendant was created by him while acting in a fiduciary character. He became and was the agent of the plaintiff to collect the note of Johnson. While so employed, and by reason of such employment, he came in possession of the plaintiff's money. He was the custodian merely of the money; it was not his money. He did not owe the plaintiff a similar sum of money; it was the plaintiff's money. The defendant in receiving the money received it in trust for the plaintiff, and in neglecting and refusing to pay it over he created a debt while acting in a fiduciary character. See *Heffren v. Jayne*, 39 Ind. 468; and see *White v. Platt*, 5 Denio, 269; indorsed in *Clark v. Iselin*, 21 Wall. 368.

"Counsel supporting the demurreur relies on the case of *Chapman v. Forsyth*, 2 How. 302, where it was held that a debt due from a cotton factor to his principal was not a fiduciary debt within the meaning of the bankrupt act of 1841. And the argument of the court in that case is to the effect that the words 'other fiduciary capacity,' in the act of 1841, related to the same class of special trusts as were named in the act, such as the trusts of guardians, executors, administrators, etc., and did not extend to implied trusts.

"The first thing to be noticed in regard to this case is that the wording of the act of 1867 is different from the act of 1841 in relation to the debts to be discharged under the respective acts. The act of 1841 released all debts which had not been 'created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity.'

"The act of 1867 released all debts which were not 'created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character.' There is so wide a difference in the language of the two acts that it would seem that the reasoning in *Chapman v. Forsyth* entirely falls when applied to the act of 1867. There is no chance under this act to make any difference between special and implied trusts. All trusts, special, express or implied, must be included under the head of 'any fiduciary character,' or else no exception is made by the act of 1867 in regard to such trusts. I have examined the case of *Nesbitt v. Clark*, 95 U. S. 704, where *Chapman v. Forsyth* is quoted approvingly, but I do not think that case is adverse to the view I take of this.

"I have also examined the many other cases referred to in argument as deciding that debts due from cotton factors and commission merchants for goods of principal sold are not fiduciary debts under the act of 1867; and if this were a debt due by a cotton factor or commission merchant I should have some doubt, though I think I should follow Judge BLATCHFORD and the several Supreme Courts of the States on the point, rather than the cases cited by the defendant. See *In re Seymour*, 6 Int. Rev. Rec. 60; *In re Kimball*, 6 Blatchf. 292; *Lemcke v. Booth*, 47 Mo. 385; *Banning v. Bleakley*, 27 La. Ann. 257. But there is a wide distinction between the character of business of a cotton factor and an agent to collect money, and if the question of the character of indebtedness of a cotton factor to his principal for goods sold be doubtful, the character of an agent receiving money for his principal ought to be clear. In the one case financial standing and business capacity are the tests of employment; in the other, honesty and integrity are the tests. Default in the one implies bad judgment, misfortune, bad luck, but not dishonesty. Default in the other implies recreancy to trust, if not absolute dishonesty. In the one case a bankrupt law releases an unfortunate debtor and restores a business man to the commercial world; in the other, the bankrupt law would be made a cover and protection for the rogues who devour widows' houses.

"In *Chapman v. Forsyth* the court says that 'such a construction against commission merchants would have left but few debts upon which the law could operate; and this was a reason for the judgment in that case. This language does not apply to the law of 1867, but if it did I should hesitate a long time before I let the defendant in this case escape in order to widen the operation of a bankrupt law.'

In *Herman v. Lynch*, 28 Kans. 435, the bankrupt had received from A. money gratuitously to purchase, exchange and remit to discharge a debt of A. but converted it to his own use, and never purchased the exchange nor remitted. Held, fiduciary, and not discharged. The court said: "The last act was certainly not intended to be merely a re-enactment of the first. If the intention of Congress had been merely to re-enact the first

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act, the language of the last act would have been the same as in the first. But by leaving out of the last act the words 'executor, administrator, guardian and trustee,' where these words were included in the first act, and also leaving out of the last act the words 'factor, broker,' etc., where these words were included in the first act, and including in the last act only public officers and persons acting in a fiduciary character, Congress either intended that all debts created by the defalcations of executors, administrators, guardians and trustees, should be discharged as other debts are generally discharged, or intended that no debt created by the defalcation of any person 'while acting in any fiduciary character' should be discharged. Now if we should construe the act of 1867, with said words left out, in the same manner that some of the authorities cited by the defendant construed the act of 1841, with said words incorporated in the act, then all debts would be discharged except such as are created by defalcation of a public officer, or by the defalcation of some person acting in a like capacity, such as a public agent for the collection and disbursement of money or other property belonging to the public. This would certainly narrow the meaning of the words, 'any fiduciary character,' and broaden the provisions of the act for the discharge of fiduciary debts to an extent never contemplated by the framers of the act; and we do not think that it would be a fair or reasonable construction of the act. We think some of the decisions cited by the defendant are correct. But they do not decide this case. And there are some of the decisions referred to by the defendant with which we do not agree. We think that both reason and the weight of authority are against them. We think that the act of 1867 means just what it says. We think that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; and construing the act in this manner, the debt of the defendant is not discharged."

On the other side. *Crouan v. Cutting*, 104 Mass. 245; s. c., 6 Am. Rep. 232, held that an administrator receiving acceptances for collection, and to apply part of the proceeds to the payment of a debt due the estate, and to return the balance, is not acting in a "fiduciary character." The court held that the transaction "involved no element other than that of contract," and that "the existence of the liability did not spring from any breach of trust," as the "debt did not result from, but preceded the default." But they continue, after citing *Chapman v. Forayth*, *supra*, and remarking that "the same or substantially the same language was subsequently used" in the act of 1867: "The argument that the omission in the act of 1867, of the specific trusts named in the act of 1841, by removing the reasons or one of the reasons for the construction given to the earlier act, indicates that 'fiduciary character' was used in a different sense in the latter case, does not strike us as entitled to much weight, notwithstanding the reasoning, and the consideration due to the judgment of so highly respectable a court as the District Court of the United States for the Southern District of New York, supported as we understand it to be, by the affirmance of the Circuit Court for that Circuit. On the contrary it appears to us that the inference is quite as legitimate that Congress omitted the enumeration of specific trusts for the very reason that the term 'fiduciary capacity' had, by judicial construction, received a fixed definition, and with intent that the phrase should carry that definition into the new act. The specific enumeration was omitted, because all were included in the general expression 'fiduciary.' The association of those specific trusts originally was held to be an indication of intent in the general purpose. That intent having been ascertained, has been affixed to the general term and become legal construction. If Congress had intended to adopt a different test of fiduciary debts we may presume that the intent to change the previous judicial construction would have been indicated by some distinct provision to that end, rather than left to inference from the mere omission of associate words which had ceased to be of any importance as affecting the scope of the provision." This reasoning may be outside the necessities of the decision but it is extremely cogent, and has so been accepted in subsequent cases. The court also suggested that the phrase in question implies a fiduciary relation existing previously or independently of the particular transaction from which the debt arises.

This line of reasoning was distinctly adopted in an elaborate opinion in *Woolsey v. Cade*, 54 Ala. 378; s. c., 25 Am. Rep. 711. The court also said: "The business of a factor is not confined to a single transaction with a single individual. It extends to a number of persons and

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varied transactions. A cotton factor seldom sells, or can in one sale dispose of the cotton of one customer only. He sells a number of bales classified according to quality, the price varying according to the classification, and the aggregate proceeds of sales are paid to him. The cotton was the property of several customers, to whom he must separately account, when it is ascertained how much of the differing qualities of cotton each owned. Until then the proceeds of sale are necessarily mingled with his own funds, or if deposited, are incapable of deposit otherwise than in his own name. If lost because of such mingling or of such deposit, it cannot properly be said he is guilty of a *defalcation* which imports a breach of duty, legal and moral. A debt would be due from him to his principal, he would be bound to pay, but it could not be said he had appropriated or embezzled the money of his principal." This reasoning will apply to most cases of factors. The court disapprove *Re Seymour, supra*, and adopt the reasoning which we have quoted from *Chapman v. Forsyth, supra*.

The same doctrine was held in *Green v. Chilton*, 57 Miss. 598; s. c., 34 Am. Rep. 483, in the case of an agent of a bank appropriating the proceeds of notes collected by him for the bank, to which they had been sent for collection. The court say: "It now appears settled that there is no substantial difference between the acts of 1841 and 1867 in this regard." Disapproving *Re Kimball* and *Re Seymour, supra*, and approving *Grover v. Clinton*, and *Keime v. Graff, infra*, and *Cronan v. Cotting, supra*.

The same was held of an attorney in fact. *Woodward v. Tourne*, 127 Mass. 41; s. c., 34 Am. Rep. 837, GRAY, C. J.

In *Hennequin v. Clews*, 76 N. Y. 427; s. c., 33 Am. Rep. 641, the same was held of the conversion of securities pledged as collateral to a loan. CHURCH, C. J., alluding to *Re Kimball, supra*, says: "There are some other authorities to the same effect, but the decided preponderance of judicial opinion is adverse to this construction." "It is claimed that the Bankrupt Act of 1867, by omitting the particular trusts specified in the act of 1841, and inserting only the general words, 'any fiduciary character,' is more comprehensive than the act of 1841. But I think a more reasonable inference is that the Supreme Court of the United States, having determined that these general words meant only trusts of the character specified in the act of 1841, Congress deemed it necessary to insert them." Citing *Cronan v. Cotting, supra*, and *Grover v. Clinton*, *Owsley v. Colby*, *Keime v. Graff* and *Re Smith, infra*. "It is argued that these cases apply to consignments of property to factors, and the property intrusted to agents with authority to sell, and that they are therefore distinguishable from the case at bar, but it seems to us that if there is any difference, it is in favor of those cases, because a greater confidence and trust was reposed in them than in this. Here the relation rested entirely in contract." If the debtor "violated that obligation he is liable for conversion of the property, and in a general sense he violated a trust, but not in that particular and technical sense which the Bankrupt Act contemplates."

In *Kaufman v. Alexander*, 53 Tex. 562, the court held that the particular relation in question was not fiduciary, but *obiter* expressed their adherence to the construction put on the Bankrupt Act by *Chapman v. Forsyth*, and kindred cases, observing: "We are inclined to regard the better rule as laid down in those decisions which accept the clause in question as substantially the same as in the law of 1841, and thus adopt and retain the benefit of the 'fixed judicial construction' given to the expression 'fiduciary capacity,' under the act of 1841."

The United States Circuit Court for the Western District of Wisconsin, in *Grover v. Clinton*, 8 N. B. Reg. 312, HOPKINS and DAVIS, JJ., held that money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal is not a debt created in a "fiduciary character" within the meaning of the Bankrupt Act. The court said the words of the two acts are substantially the same, and the omission of the specific descriptive words in the latter act does not alter the meaning. They rely on *Chapman v. Forsyth* and *Cronan v. Cotting, supra*, and disapprove *Re Kimball, supra*. Chief Justice WARRE held the same in a brief opinion, in the South Carolina Circuit, in *Owsley v. Cobin*, 15 N. B. Reg. 439, a case of a factor. Precisely the same was held by McKENNA, J., in the United States Circuit for the Western District of Pennsylvania, in *Keim v. Graff*, 17 N. B. Reg. 319, in a careful opinion. The Federal Supreme Court, in *Neal v. Clark*, 95 U. S. 704, Mr Justice HARLAN, in giving the opinion, held

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that "fraud" in the Bankrupt Act means positive turpitude and not implied fraud, and quote from *Chapman v. Forsyth*, with approval, the language quoted by us above, adding that "a like process of reasoning may be properly employed in construing the corresponding section of the act of 1867," and that "debts" not discharged under the latter act "are associated directly with debts created by embezzlement." This case is distinguished in the principal case. In *re Smith*, 18 N. B. Reg. 24. United States District Court, Southern District of New York, a factor's liability was held discharged in bankruptcy, by CHOATE, J. The case of *Neal v. Clark*, *supra*, was mainly relied on, and was deemed in effect to have overruled the contrary cases above cited.

There are several cases somewhat but not strictly analogous. In *Jockusch v. Tourney*, 51 Tex. 129, it is held that money collected by a bank for a customer is held upon implied contract, and not in a fiduciary character, and a debt therefor is barred by a discharge in bankruptcy. In *Heffren v. Jayne*, 39 Ind. 463; s. c., 13 Am. Rep. 281, it was held that a debt due from an attorney for money collected for a client is received in a fiduciary character, and is not barred by a discharge in bankruptcy. The court simply said: "An attorney acts in a fiduciary capacity. The relation between an attorney and client is one of great confidence, and the law imposes on an attorney the highest degree of good faith." The same is held with more consideration, in *Flanagan v. Pearson*, 42 Tex. 1; s. c., 19 Am. Rep. 40. This was distinguished in *Kaufman v. Alexander*, *supra*.

Hennequin v. Clews was approved in *Palmer v. Hussey*, 87 N. Y. 303, where the plaintiff had deposited bonds with a broker, subject to his order on ten days' notice to collect the coupons free of charge, and to allow the plaintiff ten per cent on the par value for interest. This was held not fiduciary. The court said: "It is settled, in this court, in supposed accordance with the doctrine of the Federal courts, that the 'fiduciary capacity' intended by the Bankrupt Act relates to cases of technical trust: not merely such as the law implies from the contract, but actual and expressly constituted."

Gibson v. Gorman, New Jersey Supreme Court, Jan. 1882, adopts the same view.

In *Zeperink v. Card*, 11 Fed. Rep. 295, U. S. Circuit Court, Eastern District of Missouri, McCrary, Circ. J., orally held that where a commission merchant, as agent of the owner, sells goods, and fails, without fraud but because of insolvency, to account for the proceeds of the sale, and subsequently becomes a bankrupt and receives his discharge in bankruptcy, the proceedings in bankruptcy will discharge his debt to his principal; saying, "that in my judgment the better reason, and also the greater weight of authority, supports the position of the defendants."

In a subscription to corporate stock there is nothing of a fiduciary character, and such a liability is discharged in bankruptcy. *Morrison v. Savage*, Penn. St. : So of liability as surety on a guardian's bond. *McDonald v. State*, 77 Ind. 28.

The question is strictly one of statutory comparison and Federal judicial construction, and the interpretation which State courts have put on similar language in State statutes is immaterial.

BISBING V. THIRD NATIONAL BANK.

(93 Penn. St. 79.)

Sale — judicial — change of possession.

Goods sold on execution were left with the judgment debtor with the understanding that he might repurchase them by paying the judgment. *Held*, that they could not be sold on execution by a subsequent judgment creditor.

FEIGNED issue to determine title to goods. The opinion states the case. The plaintiff had judgment below.

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E. M. Hunt, for plaintiff in error.

Francis A. Osbourne and *George P. Rich*, for defendant in error.

MERCUR, J. This issue was to determine the ownership of certain personal property. It had previously been sold on execution in favor of the plaintiff in error as the property of Packer & Sons, and purchased by him. After his purchase he suffered the goods to remain in possession of the former owners. The defendant in error subsequently levied on the same goods as the property of Packer & Sons. On the trial of the issue the plaintiff was the only witness sworn. It appeared by the record evidence and by his testimony, that all the forms of law requisite to make a valid sale were observed. That portion of his evidence which appears to have controlled the opinion of the court was in these words: "I issued execution and sold them out to protect myself. I left the goods for them to use, the understanding being that they might buy them back if they could, that is, if they could pay me what was actually due me on the note; but they were unable to do so."

Two questions arise under this evidence. The one, the object in making the sale; the other, the arrangement under which the goods remained in possession of Packer & Sons. The plaintiff had an undoubted right to sell for the purpose of protecting himself, and for a like purpose to buy at the sale and acquire a good title to the property. If he did thus acquire such a title he might leave the goods in the possession of the former owners without thereby making the property subject to their debts. A change of possession is not necessary to give validity to a judicial sale. *Myers v. Harvey*, 2 P. & W. 478; *Craig's Appeal*, 27 P. F. Smith, 448; *Lothrop v. Wightman*, 5 Wright, 297. The witness does not testify that there was any understanding, prior to the sale, by which he was to purchase the goods or leave them in possession of the former owners; nor that they, after the sale, agreed to purchase. It was a mere offer to sell on terms which they were unable to accept. The charge of the court is very brief. It wholly omits to call the attention of the jury to the difference between an arrangement made after the sale and one made before it.

[For this reason] judgment reversed, and a *venire facias de novo* awarded.

Judgment reversed.

PEOPLE'S BANK APPEAL

(98 Penn. St. 107.)

Negotiable instrument — fraud — indorser not disclosing maker's infancy.

A minor made his note, and his father indorsed it and got it discounted without disclosing the maker's infancy or making any representation as to his age. *Held* not fraudulent.*

BILL for equitable relief. The opinion states the point. The bill was dismissed below.

Hood Gilpin and Charles Gilpin, for appellant.

E. Coppee Mitchell, for appellees.

LUDLOW, P. J., delivering the opinion below, said: "We are of the opinion that the relief prayed for in this bill cannot be granted. In every case of this description, in order to invoke the aid of a court of equity, there must exist some relation of trust and confidence between the parties. The fraud consists in the breach of a trust or confidence partly reposed, and in most, if not all of the cases, the silence of the party must impart as much as a direct affirmation, and must be deemed equivalent to it. *Ins. Co. v. Mabbet*, 1 Wis. 667; 1 Story Eq. 214.

"The facts as developed in this suit simply present a cause in which a note drawn by a minor and indorsed by his father was presented for discount and was discounted. It does not appear that any representations were made as to the age of the drawer. And without evidence it is as fair to presume that the bank discounted the paper upon the faith of the solvency of the indorser, and after due inquiry as to the drawer, as to believe that in a business transaction like this, the officers of the bank were overreached and defrauded.

"It is well also to remember that the contract made by the minor was not void, but only voidable; and while it could not bind the minor without his consent, yet the drawer did, by a writing signed by him after he attained his majority, 'ratify and confirm said

* See *People's Bk. of City of New York v. Bogart* (81 N. Y. 101), 87 Am. Rep. 481.

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promissory note, and agree that he would be bound thereby and be responsible therefor.'

"It is impossible to see in this case any such breach of trust or confidence as is required by a court of equity to enable it to act; and when the fact is that the maker of the note is a minor, silence alone is not equivalent to a direct affirmation, especially as it is possible that a voidable contract may be made with one not of age."

Per CURIAM. We affirm this decree upon the opinion of the learned president of the court below.

Decree affirmed, and appeal dismissed at the costs of the appellant.

Decree affirmed.

IN RE DAVIES.

(93 Penn. St. 116.)

Attorney at law — disbarment — withdrawal of charges by client.

Criminal proceedings having been taken by a client against his attorney for embezzlement of the client's funds, and upon his complaint proceedings having also been taken to disbar the attorney, a settlement was made, and the client consented to the entry of *nol. pros.* Held, that this did not prevent the disbarring of the attorney. *

DISBARMENT of an attorney. The opinion states the facts.

William H. Ruddiman and F. Carroll Brewster, for plaintiff in error.

R. L. Ashurst and Samuel Dickson, for Censors of Law Association.

MERCUR, J. An attorney at law sustains an important relation in the administration of justice. He possesses certain powers and privileges from which others are excluded, and assumes important duties and obligations toward both court and client. He is an officer of the former and a representative of the latter. His position is so responsible, his opportunities for good and for evil are so many,

*See *Matter of an Attorney*, 85 N. Y. 563, where the same ruling was made where the attorney had received a pardon for the offense in question.

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that both statute and common law have united in throwing all reasonable safeguards around his conduct. Before he can be admitted to the bar the act of assembly requires him to take an oath or affirmation, *inter alia*, that he will behave himself in the office of attorney within the court, according to the best of his learning and ability, "and with all good fidelity as well to the court as to the client." The court also requires satisfactory evidence of proper knowledge of the law, and of the good moral character of the applicant.

The power of a court to admit as an attorney to its bar a person possessing the requisite qualifications, and to remove him therefrom when found unworthy, has been recognized for ages and cannot now be questioned. In fact the power of removal for just cause is as necessary as that of admission for a due administration of law. By admitting him the court presents him to the public as worthy of its confidence in all his professional duties and relations. If afterward it comes to the knowledge of the court that he has become unworthy, it is its duty to withdraw that indorsement and thereby cease to hold him out to the public as worthy of professional employment. The act of 11th April, 1834, recognizes this right and duty as existing in the court. The seventy-fourth section thereof declares, "If any such attorney shall retain money belonging to his client, after demand made by the client for payment thereof, it shall be the duty of the court to cause the name of such attorney to be stricken from the record of the attorneys, and to prevent him from prosecuting longer in the said court." The specific cause named in this act, which makes the action of the court mandatory, has often been held to be such misconduct as to justify a court in suspending an attorney from practice or in striking his name from the rolls. *People v. Smith*, 3 Caines, 221; *Same v. Wilson*, 5 Johns. 368; *Bohanan v. Peterson*, 9 Wend. 503; *Hyman v. Washington*, 2 McCord, 493; *Ex parte Ferguson*, 6 Cow. 596. None should be permitted to act who are guilty of unworthy practices or behavior in their profession. *Leigh's case*, 1 Munf. 481. Such character renders him unfit and unsafe to be intrusted with the powers of his profession. *In re Percy*, 36 N. Y. 651. The offense need not be such as to subject the attorney to indictment. If it shows such a lack of professional honesty as to make him unworthy of public confidence it is sufficient cause for striking his name from the roll. *Baker v. Commonwealth*, 10 Bush, 592. This is a power inherent in every court when a person

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is shown to be unfit to practice in it. *People v. Turner*, 1 Cal. 143; *Mills*, 1 Mich. 394; *Bradley v. Fisher*, 13 Wall. 335; *Ex parte Robinson*, 19 id. 505; *Austin's case*, 5 Rawle, 191; *Dickens' case*, 67 Penn. St. 169; s. c., 5 Am. Rep. 420. Such an order is a judicial act, to be done in the exercise of judicial discretion. It must therefore be governed by a sound judicial discretion guarding and protecting the just rights and independence of the bar, the dignity and authority of the court, and the safety and protection of the public. *Ex parte Secombe*, 19 How. 9. A member of the bar has a property in his profession. *O'Hara v. Stack*, 9 Norris, 477. He cannot be deprived of his right therein without due notice of the complaint and an opportunity to be heard. In the present case there was a full hearing. The evidence clearly established and the court found that the plaintiff in error was professionally employed by Mrs. Curtiss to procure for her a bond of \$100 from the Guarantee Trust Company; that he obtained it, and instead of delivering it to her he pledged it to one Humphreys as security for money borrowed of the latter. The bond was frequently demanded of the plaintiff in error; but he put off Mrs. Curtiss with evasive promises to deliver it, followed by a promise to pay its value at a day specified if he failed to return it. Having disregarded all his promises, Mrs. Curtiss at length made an affidavit before a magistrate charging Davies with the embezzlement of the bond. He was arrested, and after a hearing required to give bail for his appearance at the next Court of Quarter Sessions. After this, and after application to the Board of Censors of the Law Association, a settlement was made between Mrs. Curtiss and Davies by which he paid her \$100 as the value of the bond, and she consented to the entrance of a *nolle prosequi* in the criminal prosecution and a release of all claims. It is contended on the part of the plaintiff in error that this settlement operated as an absolution and remission of his offense. This view of the case ignores the fact that the exercise of the power is not for the purpose of enforcing civil remedies between parties, but to protect the court and the public against an attorney guilty of unworthy practices in his profession. He had acted in clear disregard of his duty as an attorney at the bar, and without "good fidelity" to his client. The public had rights which Mrs. Curtiss could not thus settle or destroy. The unworthy act had been fully consummated. In the exercise of its sound discretion, the court held the misconduct was such as to require that his name be stricken from the roll. This action how-

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ever is not always understood to be a perpetual disability. In some instances the court have permitted an attorney to be restored, considering the punishment in the light of a suspension. 1 Tidd's Prac. 89, and cases there cited.

We see no merit in the first assignment. This bond was procured without the aid of process issuing out of any one of the courts.

The position of a member of the bar is one of great responsibility. Good faith and integrity in his professional employments are essentially necessary. It is the duty of a court to see the proper standing is preserved. Whenever its right to strike a member from its roll appears to be impartially considered and prudently exercised, as here, we are not willing to reverse its conclusion.

Judgment affirmed.

OLIVE CEMETERY COMPANY V. CITY OF PHILADELPHIA.

(93 Penn. St. 129.)

Burial place — taxation — exemption — sewer.

A cemetery was exempted from taxation, and it was forbidden to open any street, lane or road through it. *Held*, that lots in the cemetery along the line of a street were exempt from assessment for building a sewer in the street. (See note, p. 735.)

CASE stated in opinion. The plaintiff had judgment below.

John A. Burton and Benjamin Harris Brewster, for plaintiff in error.

Henry C. Terry, for defendant in error.

STERRETT, J. The Olive Cemetery Company was incorporated by act of February 5, 1849, for the purpose of establishing and maintaining a cemetery in a certain tract of land situated on the north side of Lancaster avenue, in the county, now city of Philadelphia, containing about ten acres and twenty-two perches. The third section of the act declares, "that no street, lane or road shall hereafter be opened through the said tract occupied as a cemetery, without the consent of a majority of the lot-holders; and the same, when used

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as a place of sepulture, shall be exempt from taxation, excepting for State purposes ; and no lot which may be purchased as a place of sepulture shall be subject to attachment or execution for any debt or debts of the owners thereof ; provided that the said exemption from attachment or execution shall not extend to more than four lots as owned by any one individual."

On the line of Merion avenue, by which the cemetery is bounded on one side, all the lots have been sold and mostly used for burial purposes. In that avenue the corporate authorities of the city caused a sewer to be constructed, and filed a lien for a proportionate part of the cost thereof against the entire cemetery tract, including the lots that have been sold, and claim the right to enforce payment thereof by sale of the land. The facts are fully presented in the case stated in the nature of a special verdict, and the questions of law involved submitted to the court below in the following terms : " If the court shall be of opinion that under the said charter, the lots purchased by the lot-holders for burial purposes, and the lands of the cemetery company, are subject to lien and sale under said lien ; or that the lot-holders' consent on notice to them was not necessary before filing the lien, then judgment for the plaintiff ; but if not, then judgment for the defendant." The court entered judgment on the case stated, in favor of the city.

The main contention on the part of the cemetery company is, that the assessment for construction of the sewer on Merion avenue is a species of taxation, and clearly within the letter as well as the spirit of the exemption contained in the charter. The exemption is " from taxation, excepting for State purposes." The obvious meaning of this is that the Commonwealth releases, in favor of the cemetery company, her right to tax its land, when used as a place of sepulture, in any form or for any purpose of a local nature, as distinguished from general State purposes ; reserving to herself the right of taxation for the latter purposes only. The exemption is general, and embraces every species of taxation not specifically excepted ; and the rule is well settled, that an exception in a statute excludes all other exceptions. *Miller v. Kirkpatrick*, 5 Casey, 226. It is not pretended that municipal assessments for constructing sewers, etc., are within the accepted meaning of taxation for State purposes ; on the contrary, it is contended by the city that they do not come under the head of taxation at all. It is conceded however that the authority to make and collect such assessments is delegated

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by the Commonwealth. If it does not emanate from the inherent powers of the government to levy and collect taxes it is difficult to understand whence it comes. The only warrant for delegating such authority must be either in the right of eminent domain or in the taxing power. It cannot be found in the former, and hence it must be in the latter.

Taxation is the exercise of the inherent powers of government to compel contributions from persons and property for public purposes, either of a general or local nature. For general or State purposes, the power of taxation has usually been exercised directly by the government, while for local objects it has generally been delegated to and exercised by the municipal subdivisions of the State. The history and growth of this delegated power are traced in *Washington Avenue*, 69 Penn. St. 352; s.c., 8 Am. Rep. 255. It is there said, that "the practice of municipal taxation by counties, townships cities and boroughs for local objects had its origin in necessity and convenience. Hence, roads, bridges, culverts, sewers, pavements, school-houses and like local improvements are best made through the municipal divisions of the State and paid for by local taxation. These have always been supported as a proper exercise of the taxing power. * * * In cities and towns where the population was dense, the authorities began to make improvements of special advantage to certain of the citizens at their expense. * * * So far, public opinion and long-continued legislative practice have sustained local taxation with great unanimity, and this is strong evidence of the true interpretation of the constitutional power of the legislature to authorize municipal taxation of this sort." In *McMasters v. Commonwealth*, 3 Watts, 292, a new phase of taxation was presented in the assessment of one person's property to pay compensation awarded to another whose property had been taken for a public use under the power of eminent domain; but it was sustained as a proper application of that principle of local taxation which authorizes the assessment of property specially benefited by a local improvement of a public nature, for the purpose of defraying the expense thereof. The admitted authority of the legislature to confer upon municipal corporations the power of assessing the cost of local improvements on properties benefited is recognized in *Hammett v. Philadelphia*, 65 Penn. St. 146; s. c., 3 Am. Rep. 615; as "a species of taxation; not the taking of private property by virtue of eminent domain." We have thus referred to these cases

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not for the purpose of vindicating the right of the legislature to authorize assessments in various forms for local improvements, but to show that they are regarded as a species of taxation ; that it is only on the principle of taxation that they are sustained. The cases of *Northern Liberties v. Church*, 1 Harris, 104; *Pray v. Northern Liberties*, 7 Casey, 69, and *Borough of Greensburgh v. Young*, 3 P. F. Smith, 280, have been cited as authority for the position that assessments for local improvements are not taxes. What is said in *Washington Avenue, supra*, in regard to two of these cases is equally applicable to the other, viz. : the court did not mean to decide that such an assessment is not taxation within the general legislative power to tax. Had it been meant to say that such an assessment is not taxation at all, it would, in effect, deny the power of the legislature to authorize the assessment — a power which was affirmed in all these cases.

It follows from what has been said, that the claim of the city is a species of taxation for local and not State purposes, based solely on the taxing power delegated by the State, and inasmuch as the charter of the company expressly exempts its land from such taxation, the lien is invalid and the plaintiff in error is entitled to judgment.

If it were at all necessary, it would be an easy task to show the wisdom and propriety of exempting such property as that of the plaintiff in error from local taxation, but nothing of that kind is required. It is sufficient to know that the legislature, in creating the corporation, exempted its property from such taxation. It is unnecessary to consider other minor points involved in the case stated.

Judgment reversed ; and judgment is now entered on the case stated in favor of the defendant below.

Judgment reversed.

NOTE BY THE REPORTER.—In *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506, under a statute exempting the lands of cemetery associations from “all public taxes, rates, and assessments,” it was held that the exemption did not apply to an assessment to defray the expense of a sidewalk constructed upon a street running alongside the lands of such an association. The court said: “The taxation is a burden. It is a common burden, for the common good. The person or the class which is exempted therefrom is a favored one. A statute giving favors at the expense of the public is not to be liberally interpreted. Statutes conferring exemptions from taxation are to be strictly construed. *Orr v. Baker*, 4 Ind. 86.

“Nor are we to be controlled in the disposition of this case, solely by the consideration, that the statute in its intent to preserve this class of property, for the particular use for which it is acquired and managed by the association, is in consonance with public policy

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and good morals. However repugnant to proper sentiment it may be to have such property the subject of sale by process, it is for the legislature to say how far that sentiment shall be regarded, and it is for the court to interpret and apply the language used to that end. Apt words are used in this enactment, to preserve the property from sale on execution or voluntary application for the payment of the debts of an associate and from being alienated by him. If there are not words, whose established meaning exempts from the usual municipal assessments, a new meaning cannot be given to those employed; and it must be inferred that it was not contemplated that the association would be endangered by such assessments, made as they generally are, and resulting as they sometimes do, for the benefit of the property.

"The adjective 'public,' in the clause above quoted, applies to the nouns 'rates' and 'assessments,' as well as to the noun 'taxes.' And the use of it limits the meaning, and implies that there were in the view of the framers of the statute, taxes, rates and assessments other than those which it designates as public, and from which the public is not to be exempted. By the meaning of the word 'public,' as used in this statute, the opposite of 'private' or the opposite of 'local,' as is diversely contended, or the opposite of both, as may well be, still it must be that the legislature meant to limit its favor, and to imply that there were certain taxes, rates and assessments not public, from which the plaintiff was not to be exempted; and to these, whatever they are, the plaintiff is liable.

"We think that the current of the authorities in this State and in some of the sister States runs to this result: that public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed, for some public or general use or purpose, in which he has no direct, immediate and peculiar interest; being exactions from him toward the expense of carrying on the government, either directly and in general, that of the whole Commonwealth, or more mediately and particularly, through the intervention of municipal corporations; and that those charges and impositions which are laid directly upon the property in a circumscribed locality, to effect some work of local convenience, which in its results is of peculiar advantage and importance to the property especially assessed for the expense of it, are not public, but are local and private so far as this statute is concerned. *People v. Mayor, etc.*, 4 Comst. 419; and cases there cited, 433 *et seq.*; *Fairfield v. Ratcliff*, 20 Iowa, 398; *City of Patterson v. Society, etc.*, 4 Zab., 385; *North Lib. v. St. John's Church*, 13 Penn. St. 104; *Canal Trustees v. City of Chicago*, 12 Ill. 408; *Mayor, etc., v. Proprietors, etc.*, 7 Md. 517; *Le Fevre v. Mayor, etc.*, 2 Mich. 586.

"It is plain that the assessment of which the plaintiff complains falls within the last class, and is local and private."

To same effect, *Louisville v. Nevin* (10 Bush, 549), 19 Am. Rep. 73, and note, 73.

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(93 Penn. St. 143.)

Will—religious use—masses for souls.

A bequest to a church to be expended in masses for the testator's soul is for a religious use. (*See note, p. 738.*)

APPEAL from a decree sustaining exceptions to the report of an auditing judge. The opinion states the point.

F. W. Patten and *H. F. Hepburn*, for appellants.

A. A. Hirst, for appellee.

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STERRETT, J. By the residuary clause of his will, executed fifteen days before his death, the testator bequeathed "all the rest, residue and remainder" of his estate "to St. Mary's Catholic Church, to be expended in masses for the benefit and repose of" his soul.

It is contended that the bequest is void under the act of 1855, the eleventh section of which declares that "no estate real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will attested by two credible and at the same time disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, next of kin or heirs according to law."

While the propriety of legislation which thus limits the right of giving for religious or charitable purposes may sometimes have been questioned, it has never been doubted that the act is constitutional, and the only question presented for our consideration is, whether the residuary bequest is for either a religious or charitable use, and therefore falls within the prohibition of the statute.

The testator has clearly declared the use or purpose to which his bequest shall be applied. It is to be expended in masses for the benefit and repose of his soul. While this may not be regarded as a charitable use within the accepted meaning of the word, it is certainly in every proper sense of the term, and according to the obvious intendment of the act, a religious use. In the denomination with which the testator appears to have been identified, the mass is regarded as a prominent part of the religious service and worship. According to the Roman Catholic system of faith there exists an intermediate state of the soul, after death and before final judgment, during which guilt incurred during life and unatoned for must be expiated; and the temporary punishments to which the souls of the penitent are thus subjected may be mitigated or arrested through the efficacy of the mass as a propitiatory sacrifice. Hence the practice of offering masses for the departed. It cannot be doubted that in obeying the injunction of the testator and offering masses for the benefit and repose of his soul the officiating priest would be performing a religious service, and none the less so because intercession would be specially invoked in behalf of the testator alone. The service is just the same in kind whether it be designated to promote the spiritual welfare of one or many. Prayer for the conversion

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of a single impenitent is as purely a religious act as a petition for the salvation of thousands. The services intended to be performed in carrying out the trust created by the testator's will, as well as the objects designed to be attained, are all essentially religious in their character.

It appears to us that the bequest to St. Mary's Catholic Church was clearly for a religious use, and therefore void according to the express terms of the statute. It follows that the schedule adopted by the auditing judge should have been confirmed by the court.

The decree of the Orphans' Court is reversed at the costs of the appellee.

Decree reversed.

NOTE BY THE REPORTER.—HANNA, P. J., delivering the opinion below, said: "There can be no doubt, that in England it would be regarded as a superstitious use, and therefore void. The making of a gift to procure the saying of masses for the soul of a devisor was one of the superstitious uses prohibited by the statute of 1 Edw. 6, ch. 14. But a superstitious use can hardly be said to exist in this country, where in the absence of any State religion there can be no standard of orthodoxy. *Methodist Churches v. Remington*, 1 Watts, 224. It was said in *McLean v. Wade*, 5 Wright, 266, that 'a religious purpose is a charitable purpose.' Sir. Thomas Plumer defines a charitable use in these words: 'Where the donor appropriates a gift, either to charity or some public purpose, such as the repair of bridges, ports and havens, not operating in any manner to the benefit of himself.' *Melick v. The Asylum*, 1 Jac. C. C. 180. But the best definition of what constitutes a charitable purpose is that of Binney, adopted by the court in *Price v. Maxwell*, 4 Casey, 23, and in other cases: 'Whatever is given for the love of God, or for the love of our neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain of every thing that is personal, private or selfish, is a gift for charitable uses.'

"A religious use may be said to be such a charity with the infusion of a religious element. It is difficult to see how the present devise can be brought within the terms of this definition; so far from being free from every thing of a personal, private or selfish nature, it had its origin in a motive which was in the highest degree personal and selfish.

"The fact that the church might remotely profit by the money the testator chose to pay for its mediation in no sense elevated the gift to the rank of a gift for the advancement of religion; the object of the testator was as purely private and selfish as if he had bequeathed a fund to the church for the erection of a monument to himself, or the purchase and maintenance of a pew for his family, both of which gifts have been held not to be charities. Roper on Legacies, vol. 2, p. 138."

"It is not pretended that the question is free from embarrassment. The act of 1855 was meant to save men from the force of solicitation addressed to them under the sanction of religion in the near view of death; but as that act is in derogation of the absolute right of all men to control the disposition of their own property, it should be strictly construed. It has been the practice to award a moderate sum in payment of the services of mass in cases when the decedent is of the Catholic faith, as a part of the funeral expenses, if the testator's belief in the continued efficacy of these prayers leads him to devote the property to securing them after death. One should be careful that under cover of the statutes intended to protect him from imposition, we do not hinder him in the exercise of what he may regard as a religious duty. It is easy to imagine cases in which the testator might leave the bulk of a large estate to the church in payment of masses for the repose of his soul. But it must be remembered that the fund can never be divested for the benefit of the church from its original purpose, and that on the first attempt at diversion, equity will intervene and raise another trustee to administer it according to the intention of the donor. *Schnorr's Appeal*, 17 P. F. Smith, 126."

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In *West v. Shuttleworth*, 2 M. & K. 684, a case precisely like the principal case, it was held that such a legacy is void. The court say, "that the statute of Edw. 6 related only to superstitious uses of a particular description then existing; and it is to be observed that that statute does not declare any such gift to be unlawful, but avoids certain superstitious gifts previously created. The legacies in question therefore are not within the terms of the statute of Edw. 6, but that statute has been considered as establishing the illegality of certain gifts, and amongst others, the giving of legacies to priests to pray for the soul of the donor has in many cases been decided to be within the superstitious uses intended to be suppressed by that statute." Roper (Leg., § 119) says: "The act in its letter is retrospective, but in its spirit and operation must be taken to extend prospectively to any dispositions that might thereafter be made to the superstitious uses therein specified."

In *Duran v. Motteux*, 1 Ves. 320, there was a fund from real estate put in trust for a perpetual annuity of £10 to a minister to preach a sermon once a year to the memory of the testator, and to keep his tombstone in repair, and to keep legible the inscription thereon, and upon the stone against the wall reciting the gift; and to pay £2 annually to the clerk and £2 annually to the sexton forever; and to pay £4 annually to the mayor and corporation of St. Albans for managing and keeping account thereof. The Lord Chancellor HARDWICKE said: "The charitable uses are the best part of the disposition; and it would be very unfortunate if that part which is really good should be set aside as void, and at the same time it should happen that the worst, such as tends only to perpetuate the vanity of the testator, should be established. This perpetual annuity to the minister is a charitable use, which is not prevented by the addition of the annual sermon. So are the other two annuities; and the rest is not only a vain concomitant of the charitable bequest, but a circumstance attending the general execution thereof; and if this construction were not made, it might elude the act of Parliament, for the reward for doing these offices might be as great as the testator pleased. So the gift to the corporation is a reward for their service, and but a circumstance attending the charitable bequest; and though the keeping the accounts is not void, yet if the charity on which it was to attend is void, it must be so to." The whole devise was held void.

A bequest in trust to keep a family vault in repair is good in equity. *Gravenor v. Hallun*, Amb. 643; *Swasey v. Am. Bible Soc'y*, 57 Me. 524; *Lloyd v. Lloyd*, 16 Jan. 306. So of a monument in a church. *Hoare v. Osmond*, L. R., 1 Eq. 585. But not so far as regards the testator's own interment. *Doe v. Pitcher*, 3 M. & S. 410.

In *Piper v. Moulton*, 72 Me. 155, it was held that a bequest in trust to keep the testator's lot in a certain burying ground in good order and condition, was not for a charitable use. The court said: "A charity is a gift to any general public use, extending to all, rich or poor. 'Indeed, it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins. So if a gift for a private purpose tends to create a perpetuity, it will be void; but a gift for a public charity is not void, although in some forms it creates a perpetuity.' 2 Perry on Trusts, § 687. 'Charity is defined to be a general public use.' 1 Jarman on Wills, 192. Courts have been exceedingly liberal in not restricting the objects to be regarded as charitable. 'But,' observes GRAY, C. J., in *Drury v. Natick*, 10 Allen, 160, 'the gift must be expressly or by necessary implication for the public benefit. Therefore a private museum or a library established by private subscription for the use of subscribers, has been held not to be a charity.' In *Carnic v. Long*, 2 De Gex, Fisher & Jones, 75, the devise was to the trustees of the Penzance public library, an institution established and kept on foot by the subscription of certain inhabitants of Penzance for purchasing books for the use of the subscribers; the books to be vested in trustees for the use of the institution, to continue as long as there were ten subscribers. It was held that this was not a charity. 'The devise,' says Lord CAMPBELL, 'is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property is to be taken out of commerce and to become inalienable, not for a life or lives in being, and twenty-one years afterward, but for so long as ten members of the society shall remain. This seems to be a purpose which the law will not sanction as tending to a perpetuity.' The chancellor held this to be no charity, but a devise for the benefit of a society of certain individuals

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"The bequest of one hundred dollars to keep the testator's lot in the Piper burying ground forever in repair was not for any public purpose, beneficial to all, rich or poor. It was not a charitable use, for which a perpetuity might be created. 'A condition for keeping a tomb in repair,' observes KINDERSLEY, V. C., in *Lloyd v. Lloyd*, 10 E. L. & Eq. 139, 'is not a charitable use, and is not illegal. It may be illegal to vest property in trust for that purpose, so as to create a perpetuity; but a direction that the wife and Mary A. Lockley, are, during their lives, to enjoy the annuity and are to keep the tomb in repair, is quite lawful.' The tomb was to be kept in repair during their lives. There was no perpetuity. In *Richards v. Robson*, 31 Beav. 244, the bequest was to keep up the graves and grave-stones of certain persons in good repair. The bequests were to the church wardens in perpetuity. The court say the keeping up the tomb or building, which is of no public benefit, is not a charitable use, and the bequests were declared void. In *Hoare v. (born)*, 1 L. R. Eq. 583, a gift to keep in repair forever the vault, in which the testator's mother was interred, was held void, as not being a charity. To the same effect is the case of *Fisk v. Attorney-General*, 4 L. R. Eq. 521 and *In re Williams*, 5 L. R. Ch. Div. 733. In *re Burkhitt*, 9 L. R. Ch. Div. 576, a certain sum was bequeathed, 'the income to be applied when necessary in keeping in good repair the grave, the railing and tombstones of my late father;' the residue over and the portion of the gift for keeping the grave in repair was held void.

"In *Dexter v. Gardner*, 7 Allen, 243, a bequest in trust forever, the income of which was to be appropriated for the benefit of the 'Friends' meeting,' in a particular place, is a charity, and not void as a perpetuity, it appearing that the Friends under their usages and discipline apply the funds to the maintenance of religious worship, etc., and for the purchase and repair of burying grounds, the latter being regarded as a religious duty. It was contended that the latter purpose was not a charity; but the court held the providing and oversight of a burying ground for this sect of christians, as a religious duty, could not be distinguished from that of repairing and maintaining meeting-houses for religious worship, and sustained the trust. In *Swasey v. American Bible Society*, 57 Me. 527, it was held that a legacy to keep in repair a family burying ground might be sustained.

"But this is not even to keep in repair the family burying ground. It is simply to keep in repair his (my) lot, not the Piper bury-ground. It is not for any charitable purpose. It is for a merely secular object. It is not even for all of his family or name, rich or poor. It is not for any general purpose of public interest. 1 Tudor's Law of Charitable Trusts, ch. 1, § 14. "The erection of a monument to perpetuate the memory of the donor, is not a charitable purpose; nor is the repairing a vault or tomb containing his remains. *Contra*, it seems, if the vault be used for the interment of the donor's family." 1 Jarman on Wills, 238, 4 Am. ed."

In *Miller v. Porter*, 53 Penn. St. 292, a bequest for a public library and college, to be named after the testator, was sustained as a charity. The court said. "If an act to be a charity must indeed be free from any taint of selfishness, very much that passes under the name is spurious, while the genuine article is so extraordinary a virtue that we ought not wonder that an inspired apostle ranked it above the christian graces of Faith and Hope. But though the founding of a school of learning to perpetuate one's name may not come up to the abstract idea of a christian charity, our question is whether courts of justice, and especially this court, have not always treated it as a charity." The court defined "religious uses," negatively, as follows: "Where the conveyance is to no ecclesiastic, or church, or church-school, or hospital, or for the promotion of religion in any of its forms, or by means of any of its appliances, it cannot be considered a religious use." And they defined "religious and charitable uses," affirmatively as follows: "Legal acts done for the promotion of piety among men, or for the purpose of relieving their suffering, enlightening their ignorance, and bettering their condition." It is not very clear that the bequest in the principal case comes within any of these definitions. As counsel said: "By it he did not intend to benefit his fellow-man or advance the cause of religion. It was a devise purely private, personal and selfish."

In *Straus v. Goldschmid*, 8 Sim. 614, a bequest "to ten worthy men, including some learned men, to purchase meat and wine fit for the service of the two nights of the Pass-over," was held to be valid, "being intended to enable persons professing the Jewish religion to observe its rites." So of a bequest for preaching a sermon on Ascension Day.

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Turner v. Ogden, 1 Cox, 316. So of a devise of real and personal property for a school "wherein no book of instruction is to be used to teach, except spelling-books and the Bible." *Tatner v. Clark*, 5 Allen, 66.

A bequest to keep in repair an ornamented window in a church, though a memorial of a particular person, is valid. *Hoare v. Osgood*, L. R., 1 Eq. 585. The court said: "The court cannot inquire into the motives of the donor, if the gift is in its nature a charity."

In *Attorney-General v. Guise*, 2 Vern. 266, a charge for an annual sum for the education of Scotchmen to propagate the doctrine of the church in England in Scotland, was treated as superstitious, because presbyteries were settled there by act of Parliament; and in *De Costa v. DePas*, Amb. 228, a legacy to establish a Jesuba or assembly for reading the Jewish law and instructing the Jews in their religion, was not supported for that purpose; and in *Habershon v. Vardon*, 7 Eng. L. & Eq. 228, a bequest for the political restoration of the Jews to Jerusalem was held void. But a gift to Methodists was held good in *Methodist Church v. Remington*, 1 Watts, 224; and so of Friends or Quakers, in *Price v. Maxwell*, 28 Penn. St. 28, and *Dexter v. Gardner*, 7 Allen, 247; and so of Shakers, *Gass v. White*, 2 Dana, 170.

In *Simpson v. Welcome*, 72 Me. 496, a trust for the "purchase and distribution of such religious books and reading as they shall deem best," was held a religious public charity and it was also held that "religious" meant Christian.

See *Manners v. Philadelphia Library Society*, post, 741; *County of Hennepin v. Brotherhood of Gethsemane*, 27 Minn. 400; S. C. 38 Am. Rep. 298.

MANNERS V. PHILADELPHIA LIBRARY COMPANY.

(93 Penn. St. 165.)

Will — immoral trust — public library — atheistical books.

A testamentary provision in trust for founding and endowing a public library is not avoided by the direction to publish books written by the testator, averred to be atheistical, nor by a direction that the trustees shall not exclude any book "on account of its difference from the ordinary or conventional opinions on science, government, theology, morals or medicine;" the former not being a condition precedent, and the latter being a mere negative recommendation. (See note, p. 748.)

BILL to contest a will. The opinion states the case. The defendant had judgment below.

F. Carroll Brewster and *Wm. A. Porter*, for appellants.

W. H. Rawle and *R. C. McMurtrie*, for Library Company.

PAXSON, J. This was a bill in equity filed in the court below by Robert Manners, of London, one of the heirs at law of Dr. James Rush, deceased, against Henry J. Williams and the Library Company of Philadelphia. Subsequently Elizabeth Murray Rush, a daughter of James Murray Rush, deceased, and a grand-niece of the said

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James Rush, upon application to the court below, was allowed to become a party plaintiff. The defendant Williams was the executor of the last will and testament of Dr. Rush, and the defendant corporation was the residuary legatee under his will, and the recipient of nearly the whole of his large estate. The object of the bill, briefly stated, was to recover from the defendants the residuary estate, and the court below was asked to declare that the provisions of the testator's will in regard to the Philadelphia Library were impracticable and impossible of execution, or if capable of execution, that they were contrary to public policy and sound morals, and that the defendant Williams be declared a trustee for plaintiff. The defendants filed separate demurrers, upon which issue was joined. The demurrers were sustained, and the bill dismissed, with costs. It is the appeal from this decree we are now called upon to consider.

We need not dwell at length upon that part of the bill which charges that the provisions of the will are impossible of execution. The argument upon this branch of the case rests upon the fact that the testator, in and by the last codicil to his will, directed that the "whole remainder" of his estate should be expended "in the purchase of a lot and the erection of the library building, construction of book-cases, etc., leaving the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution." It was urged that here was a direction for the construction of a magnificent shell without any provision to purchase books; that to erect a building of the character indicated and line its walls with shelves upon which no books could ever be placed, would not be creating a library, but on the contrary, would defeat the very object the testator had in his mind, and would serve no useful purpose which a court of equity would be under a duty to enforce as against the heir at law. It is sufficient to say, by way of answer to this, that the allegation of the want of funds to sustain the library is unfounded. The codicil relied on by the plaintiffs provides that the annuities, amounting to \$10,400, shall be applied to the support of the library as they shall respectively fall in. In addition, this was the gift of a building to a library company already organized, which had been in existence for many years, and as we learn from the will of Dr. Rush, with funds and income of its own. The chief object of the testator was to enlarge the scope of a charity already in existence, and not to found a new one. It cannot be

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seriously contended that the devise of a building to a library company for the safe-keeping and convenient use of its books is void or incapable of execution, because unaccompanied with the bequest of a fund to purchase books, pay the taxes, or provide for any of the other expenses of such institutions.

The entire weight of the able arguments on behalf of the plaintiffs was brought to bear upon the single point, that to carry out the provisions of the will of Dr. Rush would be contrary to every principle of good morals and religion, and against the policy of the law ; the amended bill expressly charging "that the works directed by the said Dr. James Rush to be published every ten years, and earlier and oftener if called for, in the paper writing dated April 18, 1867 (last codicil), contain infidel and atheistical sentiments, teachings and arguments, and that said works deny the truths of the Christian religion, and of revelation, and the existence of a God ; and the plaintiff charges that the effect of carrying out and executing said trust would be the propagation of infidel and atheistical doctrines, and would be contrary to good morals and to law." The amendment containing the foregoing grave averments was filed in the court below after the case had been argued and the day before it was decided. The defendants contend that it was filed irregularly, and ought not to be considered here. Yet it comes up regularly, no motion has been made here or in the court below to purge the record, and for the purposes of this case we shall consider it as before us, without however deciding any question of its regularity. The only other matter relied on by the plaintiffs to sustain their position is the fifth section of the first codicil of the testator's will, which is as follows :

"I do not wish that any work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency."

Following immediately after, in the same section of the same codicil, the testator adds, evidently in explanation and vindication of the above, the following :

"Temperate, sincere and intelligent inquiry and discussion are only to be dreaded by the advocates of error. The truth need not fear them, nor do I wish the Ridgway Branch of the Philadelphia Library to be incumbered with the ephemeral biographies, novels

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and works of fiction or amusement, newspapers or periodicals, which form so large a part of the current literature of the day. The great object of a public library is to bring within the reach of the reader and student works which private collections do not and cannot contain, and which in no other way could be accessible to the public. Its excellence will depend, not upon the number of its volumes, but upon their intrinsic value; and I wish this principle to be carried out by the managers, who, I hope, will never be influenced by the too common ambition for mere numerical superiority."

The plaintiffs contend that the will and codicils of Dr. Rush contain a foundation for atheism and infidelity; that the law, while tolerating the freest discussion, will never lend its hand for the protection and support of immorality; that in a land where religion and sound morals are recognized as the foundation-stones of government, no trust can exist for the protection of that which destroys the State.

No fault is found with this statement of the law. It may be regarded as settled in Pennsylvania, that a court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality or hostility to the existing form of government. A man may do many things while living which the law will not do for him after he is dead. He may deny the existence of a God, and employ his fortune in the dissemination of infidel views, but should he leave his fortune in trust for such purposes, the law will strike down the trust as *contra bonos mores*. We need not elaborate this question nor extend the illustrations. The whole subject is thoroughly discussed in a number of cases which fully sustain the principle above stated. See *Updegraph v. Commonwealth*, 11 S. & R. 394; *Vidal v. Girard's Executors*, 2 How. 127; *Zeissweiss v. James*, 13 P. F. Smith, 465. In the case last cited, the testator devised all his property to his grand-nieces for their lives and the life of the survivors, remainder to "The Infidel Society in Philadelphia, hereafter to be incorporated for the purpose of building a hall for the free discussion of religion, politics," etc. This court said, referring to the trust for the infidel society: "It is plain that no court would ever undertake to administer such a charity."

This brings us to the examination of the grounds upon which it is alleged that the trusts of Dr. Rush's will are not fit to be enforced

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in a State where good order and sound morals prevail, and where Christianity is the popular and recognized religion.

Much stress is laid upon the expression by the testator in the first codicil, of the wish that no work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subject of science, government, theology, morals or medicine. This language is construed by the plaintiffs as a direction or command that every work *shall* be included, however much it may be at variance in its teachings or doctrines from the ordinary or conventional opinions on the subject referred to, provided it contains neither ribaldry nor indecency. That is to say, all works advocating atheism, infidelity and immorality generally shall be included; and that no discretion is left to the executor under the will to exclude such books. While the words "I wish" in a will are sometimes construed as a command and not merely as precatory, we do not so regard them here. The testator evidently intended to express a preference merely, and however binding the executor might regard it *in foro conscientiæ*, it would not be held to be binding upon him legally.

We must examine this clause of the will from the testator's standpoint, so far as that is possible, in order to ascertain his meaning in the paragraph in question. He was an educated man, of scholarly habits, and of no mean scientific attainments. The ample fortune which he enjoyed gave him the opportunities of indulging his tastes fully. He says in his will: "My property has enabled me to devote, happily and undisturbed, the latter part of my life to pursuits of scientific inquiry, which I have deemed to be more beneficial than the mere common enjoyment of an ample fortune." In his researches in the paths of science, even in the line of his own profession, it is not unlikely he fully realized that the conventional opinions of yesterday may not be those of to-day, and are not likely to be those of to-morrow. He possibly remembered that when he commenced the practice of medicine, a patient burning with fever was not allowed a breath of fresh air or a drink of cold water; that bleeding was resorted to in almost every disease; that the introduction of anæsthetics was by some regarded as impious and unscriptural, and an attempt on the part of females to defy the primeval curse; that before his day, Harvey's theory of the circulation of the blood was treated with derision and cost that eminent physician a large portion of his practice, and that Jenner's discovery of vacci-

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nation was denounced by his own profession as empirical, and by the clergy as wicked. And outside of his own profession, in science, government, theology and morals, he would have seen substantially the same thing ; one discovery treading quickly upon the heels of another ; one conventional opinion after another giving way before the spread of learning and the advance of science. From his own experience in his various researches the testator probably realized the importance and value to educated men of a public library which should place within their reach such books as are not readily accessible. With a desire to promote temperate, sincere and intelligent inquiry and discussion, he imposes no restriction upon the character of the books, except that they shall not contain either ribaldry or indecency. He would make his library a place where the student, whether of science, government or theology, could find the information for which he longed. His recommendation in regard to books was negative merely. Beyond his own writings, which will be noticed hereafter, he directed no book to be placed upon the shelves. This is as true in regard to theology as to any of the other subjects mentioned. It can hardly be said that the interests of Christianity and sound morality require that the student of theology shall be debarred access to all books that may be regarded as objectionable from an orthodox standpoint. He is best armed to defend Christianity who is familiar with the arguments against it. To enforce such a rule would exclude from this library a vast amount of the choice literature of the past ; the works of authors who merely wrote according to the light of their day and generation. We may now safely enjoy all that is good of their writings. The world has outgrown their errors.

The amendment to the bill presents a different question. It is there distinctly charged that the works of Dr. Rush, which by his will he directs to be published every ten years, contain atheistical and infidel sentiments and deny the truths of Christian religion, of revelation, and the existence of a God. As this averment comes up upon the record and stands unchallenged, we must assume it to be true. The works of Dr. Rush are not before us, and we state merely the legal effect of the pleadings. We have already seen that no trust can be sustained in Pennsylvania for the propagation of such sentiments. Hence, if the primary object of the trusts of the will is to disseminate infidel views, or to attack the popular religion of the country, it would be the duty of a court of equity to

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declare such trusts to be against public policy and therefore void. But the devise in his will is to a public library ; to extend the usefulness of one already in existence if his devise is accepted, or to found a new one if his munificent gift is declined. This is an object which the law favors and a trust which equity will administer. It was recently held by this court that the Philadelphia Library was a public charity, and its property, the very building in question, free from taxation for that reason. *Donohugh v. Library Company*, 5 Norris, 306. The devise to the library being for a lawful purpose, and having vested, and the primary intent of the testator being to assist what this court has declared to be a "purely public charity," is the intent of the testator to be defeated and the trust set aside because one of the directions or conditions of the bequest as to a secondary intent may happen to be illegal? The answer to this question is not difficult. It is at least doubtful since the passage of the act of 27th of April, 1855 (Pamph. L. 331), whether the heir at law has any standing in court upon a bill to set aside the trusts of a will. Conceding however that said act does not apply to this case, the authorities are clear that the law will strike down the unlawful direction and leave the primary intent untouched. To this extent the doctrine of *cy pres* is part of the law of Pennsylvania. We need not load this opinion with an extended citation of authorities. The subject is fully discussed and the authorities collected in the recent case of *City of Philadelphia v. Girard's Heirs*, 9 Wright, 9. The principle is there stated that "it is a rule of law and equity that where a vested estate is distinctly given and there are annexed to it conditions, limitations, powers, trusts (including trusts for accumulation) or other restraints relative to its use, management or disposal, that are not allowed by law, it is these restraints and the estates limited on them that are void, and not the principal or vested estate." The clause in Dr. Rush's will regarding the character of the works to be placed in the library and the provision in the codicil for the publication of his own works are not conditions precedent to the vesting of the estate. If they are unlawful they will be disregarded. If the fact be that the testator's works are of the character alleged in the bill it is not likely the defendants will ever publish them. No court would compel them to do so.

[Omitting minor questions.]

We need not pursue the subject further nor discuss the minor

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questions involved. With the failure to establish the main proposition that the trust fails by reason of the objectionable character of Dr. Rush's works, the superstructure of this bill crumbles.

The decree is affirmed and the appeal dismissed at the costs of the appellants.

Decree affirmed.

NOTE BY THE REPORTER.—The principle of this case is well illustrated in the recent case of *Piper v. Moullon*, 72 Me. 155. There a testator made a bequest of \$100 to a town, in trust, on condition that the town should expend the income thereof forever to keep his lot in a certain burying ground in good order and condition, and an iron fence around the same; and made another bequest to the town of the rest and remainder of his estate to establish a school fund, on condition that said town should accept and perform the conditions as to his lot in the burying ground. *Held*, 1. That the bequest of the \$100 was not for a charitable use, and was void as creating a perpetuity. 2. That the bequest to establish a school fund was valid; the condition to keep the testator's lot in repair was a condition subsequent: the estate passes to the town subject to the condition subsequent if valid, if void or against law, discharged of the condition. The court said: "Assuming the bequest in perpetuity to keep in repair the testator's lot in the Piper burying ground to be void, the counsel for the complainants in his able argument relies upon the case of *Fowler v. Fowler*, 10 Jur. (N. S.) 648, as showing that the gift, the income of which was to be applied to keeping the tombs of the testator and family in repair, is void as tending to create a perpetuity, and if so connected with a gift over as to be inseparable, both will be held void. It appeared in that case that Rev. W. Fowler, by his will, directed his executors and executrix to invest and set apart £500 in government securities, upon the permanent trust of appropriating the income "in and toward the maintenance in good order of the grave and gravestones in Baldock churchyard, of my late wife and others, the surplus of such year's income to the rector of Baldock for the time being, for his own use." Both counsel admitted the gift of income for the maintenance of the graves was void. The question was whether this fact invalidated the subsequent bequest to the rector of Baldock, as the sum necessary for carrying into effect the first was not capable of being ascertained. Sir JOHN ROMILLY, M. R., in his opinion says: 'The difficulty is that it is contended the gift is altogether void, and cases cited establish that position; that if a sum of money be given, part of which is to be applied to purposes which cannot be ascertained or which fail, and the remainder is given to other purposes, the whole gift fails, because of the invalidity of the first portion of the gift * * * although I cannot understand the principle in these cases, it is so well-established by authority, I must hold the gift of the overplus void. I think I am bound by the cases *Chapman v. Brown*, 6 Ves. 404, and the *Attorney-General v. Hinckman*, 2 J. & W. 270, and as I cannot determine in what way the amount necessary to keep the tombs in repair is to be ascertained, I cannot determine the amount given to the rector of Baldock for the time being, I am of opinion that the whole gift fails.' The uncertainty of the amount necessary for repairs is the basis of the decision, but in the case at bar the uncertainty relates only to the fraction of the hundred dollars given for the purpose of repairs, and to nothing else.' "

"But if possible the will of the testator should be sustained. His primary object, 'his well considered and settled purpose,' was to dispose of his property to do the most good and be of the greatest benefit in promoting popular education in the town of Parsonsfield. Is that purpose to be defeated by reason of a gift, which cannot be sustained? The Piper high school was the paramount purpose, regardless of any claims of his relatives, which he entirely negated.

"In *Hoare v. Osborn*, 1 L. R. Eq. Cases, 587, KINDERSLEY, V. C., says: 'The one-third of the fund attributable to the gift for the repair of the vault, which is void, falls into the residue.' In *Fisk v. Attorney-General*, 4 L. R. Eq. Cases, 521, the bequest was of 1,000l consols to the rector and church-wardens of a parish, and their successors, upon trust to apply such of the dividends as should be necessary or required in keeping her family grave

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in repair, and to pay and divide the residue every year forever amongst the aged poor of the parish. Sir W. PAGE WOOD, V. C., after examining the authorities, concludes thus: 'There will be a declaration that the legacy of 1,000*l* given to the rectors and church wardens of St. James, Liverpool, is a good gift, and that they take the same discharged from the obligation of keeping in repair the family grave of the testatrix.'

"The decision, *Fowler v. Fowler*, relied upon by the counsel for the complainants, is made by ROMILLY, V. C., to rest upon the cases of *Chapman v. Brown*, and the *Attorney-General v. Hurman*, though in his opinion he states he could not understand the principle upon which they were determined. In *Milford v. Reynolds*, 1 Phillips Ch. 159 (19 Con. Ch.) those cases were considered and the amount necessary to comply with that portion of the will providing for a monument was referred to a master to ascertain the sum needed for that purpose. In *re Williams*, 5 L. R. Ch. Div. 735, the case of *Chapman v. Brown* was considered as overruled. In that case there was an invalid trust for the repair of tombs, and a disposition of the remainder. 'In this case,' remarks MALINS, V. C., 'if the first gift cannot take effect, there is no reason whatever why the whole fund should not be applied to the second object. If the first gift had taken effect, only a small part of the fund would have been absorbed. It is therefore only so much as is required for the illegal purpose which is abstracted. The gift being void, none is required, and consequently the entire fund remains applicable to the valid purpose.' In *re Burkett*, 9 L. R. Ch. Div. 576, a bequest was made to keep in repair the grave, railing and tombstone of A., the residue to the poor of U. It was held that the first purpose of the gift being invalid, the whole was applicable to the charity. 'If,' says JESSELL, M. R., 'a man were to give an income of £10,000 a year, on trust, in the first place to keep his father's tombstone in repair, which under no conceivable estimate could exceed £20 a year, and directed the residue of the £10,000 a year to go to charity, I should assume that good law, which always means common sense, and common sense would concur in holding that that the £20 gift was void, and that £9,980 was given in charity. I should have no difficulty whatever in saying that was the law.'

"It may well be doubted, observes GRAY, J., in *Giles v. Boston, W. & F. Society*, 10 Allen, 355, 'whether this condition to maintain a private tomb or burial place, was not void as tending to create a perpetuity.' In *Dawson v. Small*, L. R., 18 Eq. 114, the testator bequeathed to his executors £600, out of his personal estate upon trust, to invest and apply the income, in keeping in good repair all the tombstones and head stones of his relatives and himself in G. churchyard, and directed that any surplus that might remain after defraying yearly the expenses before stated should be given by his executors every year to poor pious members of the Methodist society above fifty years old. Held, that the trust to keep the tombstones in repair being honorary only, the whole £600 was well given for the benefit of the Methodist poor discharged from the obligation of keeping the tombstones in repair. 'The obligation to keep up the tombstones,' observes Sir JAMES BACON, V. C., 'is merely honorary, but the obligation to give all that is not applied for the purposes first mentioned, is by no means honorary; it is a trust that must be executed.' So in the case at bar. In *Hornberger v. Hornberger*, 12 Heisk (Tenn.) 635, the court held a trust for the support and maintenance of the testator's graveyard was void.

"If the bequest for the keeping of testator's grave, railing and tombstone was a valid one, 'the average amount for repair,' says JESSELL, M. R., in *re Birkett*, 9 Ch. D. 576, of his lot and the iron fence, 'might be ascertained by any competent person.' The amount for that purpose being ascertained, the rest must be devoted to the charitable purposes indicated by the testator. If this bequest was invalid, then it falls into the residue.

"In *Nourse v. Merrium*, 8 Cush. 11, there was a bequest to the town of Bolton subject to a condition held by the court to be contrary to law and public policy. The question was, whether the void condition could defeat the will otherwise valid, or not, and the court held the bequest valid, as if no such illegal condition had been inserted. The same principle is affirmed in *Drury v. Natick*, 10 Allen, 183, where the court say that a condition, so far as it undertakes to impose obligation upon a town for the future, which it could not legally assume, would be repugnant to the grant and void. In *Wilkinson v. Wilkinson*, L. R., 12 Eq. & Bank. Cases, 604, it was held that a condition to do what the law forbids is invalid, the court holding that a condition, which required the omission of a duty, was void. To the same effect is the case of *Attorney-General v. Greenhill*, 31

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Beav. 193. When a deed of land is on condition subsequent, the fee is conveyed with all its qualities of transmission. The condition has not the effect to limit the title, until it becomes operative to defeat it. *Shattuck v. Hastings*, 99 Mass. 23. Conditions requiring an illegal act are void. In case of conditions subsequent, when the estate or bequest is made dependent upon their full or continued performance, 'if such conditions are illegal or void for any cause or are or become impossible of performance, the effect is not to defeat the estate dependent upon them, but that continues, having once vested, the same as if no condition had been attached.' 2 Redf. on Wills (2d ed.), 285. It must be remarked that here there is no express provision that the estate shall go over on the failure of the condition, in which case regard must be had to the express words of the will.

"The condition to take care of the testator's lot in the Piper burying ground, is manifestly a condition subsequent. The estate then vests in the town. It must remain there if the condition be one which is against the rules of law."

See *Rhymer's appeal*, ante, 736.

DOUGHERTY V. CENTRAL NATIONAL BANK.

(93 Penn. St. 227.)

Debtor and creditor — discount of note — rescission on discovery of maker's insolvency.

A bank discounted a note and placed the proceeds to the credit of the borrower. Subsequently discovering that the maker was insolvent, it tendered back the note and refused to pay the proceeds to the borrower's assignee. *Held*, right.

ASSUMPSIT. The opinion states the facts. The defendant had judgment below.

A. D. Campbell and James E. Gowen, for plaintiff in error.

Edward L. Perkins and Richard C. McMurtrie, for defendant in error.

TRUNKEY, J. Whatever may be the rights of a party whose debt is due and payable, to compel an insolvent debtor to set off a claim against him not due, a party whose debt is not due has no equitable claim to have it set off against a debt of his own already due, in the hands of a party who is insolvent. *Spaulding v. Backus*, 122 Mass. 553; s. c., 23 Am. Rep. 391; *Bradley v. Angel*, 3 N. Y. 475; *In re Commercial Bank Corporation of India and the East*, L. R., 1 Ch. App. 538. In the latter case it was said that where there is on one side a debt presently due, and on the other a liability which will accrue due at a future day, the debt cannot be set

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off at law against the liability, nor can it be so set off in equity. This is at variance with *Lindsay v. Jackson*, 2 Paige, 581, where the defendants, who held notes of the plaintiffs not due, were restrained from negotiating them, to the end that they might be applied as a set-off against a debt then due by the defendants to the plaintiffs. But it is ruled in *Bradley v. Angel*, *supra*, that one whose debt is not due has no equitable right to set off against a debt due to him from an insolvent estate, and the decision in *Lindsay v. Jackson* is confined in its operation to such facts as constituted its base.

A bank has no lien on money standing to the credit of one of its depositors, for the amount of a note of such depositor discounted by the bank but which is not matured. The purpose is that the customer may draw out at his pleasure the avails of his discount. A debtor in one sum has no lien upon money in his hands for the payment of an unmatured debt owing to him, and a bank is debtor for the discount which is placed to its depositor's credit. If it could retain the money against the note, the discount would be useless to the borrower. *Jordan v. Shoe & Leather Bank*, 74 N. Y. 467 ; s. c., 30 Am. Rep. 319; *Fourth National Bank of Chicago v. City National Bank of Grand Rapids*, 68 Ill. 398.

The owner of a debt may assign it for value, and give title as against the debtor, though he holds liabilities of the creditor not yet matured at the time he received notice of the assignment. *Jeffryes v. Agra & Masterman's Bank*, L. R., 2 Eq. 673.

On the foregoing principles, the plaintiffs claim that the judgment must be reversed, and so it must if they apply to the facts of this case. The facts conceded and established by the verdict are as follows: The plaintiffs were bankers at Harrisburgh, and had an account with defendant, a bank in Philadelphia. On April 2, 1877, the balance due plaintiffs on that account was \$14,399.63, and they owed to defendant \$15,000 on a note, the proceeds of which had gone into the account. Prior to said date, the parties had agreed to a renewal of the note, and the plaintiffs sent a new one for same sum, payable May 5, 1877, which defendant received, and on the 2d of April sent the original note by mail to the plaintiffs. April 3, the plaintiffs did not open their bank for business, and were insolvent. The defendant, hearing of this, immediately charged the plaintiffs with the original note, credited them with \$85, the discount on the new one, resulting in a balance due defendant, and tendered to the plaintiffs the new note, dis-

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count and collaterals. April 2, the plaintiff gave to Weir and Hunter three checks, amounting to \$13,300, which were presented to defendant and payment refused ; but it does not appear they were presented or that defendant had notice of them till after the said tender and withdrawal of the credit.

The question is, shall the defendant, having discounted the plaintiffs' note and extended their credit for its amount, and upon learning of their insolvency before payment to or notice of any checks or assignments by them, having withdrawn the credit and tendered back the consideration, be compelled to pay the money ? If so, it would be against everybody's sense of right. The point is not merely one of set-off, whether legal or equitable.

Justice and equity forbid that one man's money shall be applied to the payment of another man's debts. On this is based the right of a vendor to stoppage *in transitu*, which arises solely upon the insolvency of the buyer. Where a vendor has delivered goods out of his possession into the hands of a carrier for delivery to the buyer, if he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. It was long a mooted question whether the effect of this remedy of the vendor is a rescission of the sale, or a restoration of possession of the goods with the rights of an unpaid vendor ; but now it seems the better opinion that the contract is not rescinded. Although this remedy of a vendor, which exists only before actual delivery of the goods into the buyer's possession, cannot be exercised in precisely the same mode by a lender of money or credit, yet, for similar cause, the lender ought to have as efficient remedy until the money is paid to or the credit is used by the borrower. The lender's remedy may have the effect of a rescission of the bargain. Goods can be held subject to a lien for the price agreed upon, and if disposed of for more or less than that, the buyer may have the gain or suffer the loss ; but when a borrower has as little right to the money as a buyer has to the goods, it is impracticable to hold and dispose of the money with like result. Nor is there reason for so holding — the value of the goods may increase or diminish, whereby the buyer may be gainer or loser by his contract — the value of the money is fixed. Insolvency takes the pith out of the borrower's promise to pay, and if he has not yet received

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the money, he should not take it. He did not get the credit in view of his bankruptcy.

The consideration so failed that the defendant was warranted in tendering it back, and an equity arises against the legal plaintiffs which prevents their enforcement of the contract. To permit them to recover after their note, the foundation of their claim, is proved worthless, would be the grossest injustice. The defendant's agreement to take the renewal note was not wittingly made for an empty promise.

Plaintiffs contend that Hunter and Weir are innocent purchasers for value. In what sense? They asked no information before taking the checks. No paper of any kind was given by defendant showing that the plaintiffs had right to draw or assign. Before presentment or notice of the checks, the plaintiff's insolvency was shown by a notorious act, and their right to draw was immediately denied by defendant. A vendor's right of stoppage *in transitu* is defeasible in one way only, and that is, where the goods are represented by a bill of lading, which is in the vendee's possession with the vendor's assent and is transferred to a third person who in good faith gives value for it. Here the defendant did nothing to mislead third persons, and the plaintiffs had no writing to assign. The facts reveal no superior equity in the persons for whose use the action is brought.

We are compelled to the conclusion, 1. That the defendant had right to tender back the discounted note and refuse payment to the legal plaintiffs, and 2. That the assignees have no equities superior to the defendant, and there cannot be a recovery for their use.

Judgment affirmed.

MERCUR and STERRETT, JJ., dissented.

LINNARD'S APPEAL

(93 Penn. St. 313.)

Will — cancellation of legacies — alteration.

A testator after execution of his will drew his pen transversely across the words creating some of the legacies, and in another instance, by means of visible alterations, substituted a less sum than that originally provided;

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several codicils were added. After probate of the whole and in the absence of proof that the alterations were made after the last codicil, *held*, that the former legacies were cancelled and the latter not.*

APPEAL from decree of distribution of an estate. The opinion states the case.

John R. Read and Silas W. Pettit, for appellant.

No argument nor paper book, *contra*.

STERRETT, J. The will of Miss Linnard, consisting of the original paper, dated December 5, 1877, executed in the presence of two subscribing witnesses, and four codicils signed by her but not dated or witnessed, was admitted to probate September 26, 1878, four days after her decease. The original paper was re-signed by the testatrix immediately below and in connection with the attestation clause over date of December 13, 1877. Some time thereafter she made several changes in her will by drawing a pen transversely across the words creating some of the legacies, and in one instance she substituted a sum different from that originally written. In the seventh item she had given to her nephew, the appellant, \$500 in trust, to invest and pay the income to Cornelia Purnell during her life, and at her decease the principal to fall into her residuary estate. She altered this bequest by drawing her pen across the word "five" and writing over it the word, "three," and also placing the numeral "3" both above and beneath the erased word. In a similar manner she erased a clause in the second item, giving a legacy of \$500 to Eugene, son of her nephew, John J. Linnard, and in the sixth item a legacy of \$200 to another person; and also in the second paragraph of the first codicil, together with her signature thereto, in which she had made a different disposition of the \$500 legacy stricken out of the second item of the will. After or in connection with the erasure of the paragraph referred to, she appears to have completed and signed what now appears as the first codicil. The other codicils, without date or subscribing witnesses, follow in their order. The will as probated exhibits these erasures and alterations; the words erased in the manner above stated are all distinctly legible.

The act of the testatrix in thus striking out the words in the

* To same effect, *Bigelow v. Gillott* (123 Mass. 102), 25 Am. Rep. 32, and note, 35.

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second and sixth items was evidently intended to operate as a cancellation of her will as to these clauses, and was quite sufficient for that purpose; but no such intention can be inferred from the erasure and interlineations in the seventh item. It is very clear that it was not her intention to cancel it, or wholly revoke the legacy. Her object was simply to reduce the amount from \$500 to \$300; and by holding, as the court did, that in the absence of proof of re-execution after the alteration was made, the substituted legacy could not be sustained, her intention was defeated. While the act of 1833 provides that no will in writing shall be repealed, nor shall any devise or direction therein be altered otherwise than by some other will or codicil in writing, etc., it cannot be doubted that the execution of the second or either of the subsequent codicils, after the alteration, would have the effect of confirming the will as thus altered and would be a sufficient compliance with the act. A duly executed codicil operates as a republication of the original will so as to make it speak as of the date of the codicil (*Coale v. Smith*, 4 Barr. 376); and it not only operates as a new adoption of the prior will to which it refers, but also as a revocation of an intermediate will. *Neff's Appeal*, 12 Wright, 501. In *Wikoff's Appeal*, 3 Harris, 281, Chief Justice GIBSON, speaking of interlineations proved to be in the handwriting of a testatrix, says: "The presumption is that they were made at or before the time when the will was prepared for the final act." So in the present case it may fairly be presumed that the alterations, admitted to be in the handwriting of Miss Linnard, were made before she appended her signature to the last codicil. If this be so, the testamentary paper as altered, including the codicils, speaks as of that date, and should be regarded as her will, properly executed at that time. It is stated as a fact that the alterations were not made before the original paper was re-signed on December 13, 1877; but it does not follow from this that they were not made before the last or some of the preceding codicils were executed. Indeed, the fair inference from the paper itself would seem to be that they were made before the second codicil. As has already been observed, the clause stricken out of the first codicil, before it was completed, refers to the cancelled legacy in the second item of the original paper, so that it may be fairly inferred that this was done before the testatrix signed what now stands as the first codicil; and it is quite probable that the alterations in the original paper were all made at the same time. But however that may be,

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the presumption is that she made them before she affixed her name to the last codicil. Her signature to that having been duly proved should, in the absence of evidence to the contrary, be regarded as her final act.

Moreover, the probate of the will, as we now find it, was an adjudication of its due execution, including, by necessary implication, the republication of the instrument after the alteration in question was made. This established, *prima facie* at least, the validity of the legacy; and certainly, in the absence of proof that the alteration was made after the last codicil, the legacy should have been admitted. The item containing it was not stricken out or obliterated. A single word was erased and another substituted by the testatrix, and the item, as thus altered, was adjudged to be a constituent part of her will. The clauses that were erased, and thus practically cancelled or stricken out of the will, were to be regarded in a very different light. They formed no part of the testamentary paper as probated, and were to be treated as though they had never been there. In the distribution of the estate, the will was before the court for construction, and as a guide in determining who were entitled to participate in the fund; but the question of its due execution, in whole or in part, did not properly arise in that proceeding. That matter had been adjudicated, and no appeal had been taken. We are of opinion that the legacy of \$300 in question should have been admitted to participation in the distribution.

Decree reversed and record remitted, with instructions to distribute the fund in accordance with the foregoing opinion. The costs of this appeal to be paid out of the fund for distribution.

Judgment accordingly.

BIERY V. ZIEGLER.

(93 Penn. St. 357.)

Marriage — husband's liability on wife's ante-nuptial lease.

A widow hired a house, and afterward during the term re-married, continuing in the house, and receiving visits there from her husband, who however lived elsewhere. *Held*, that the husband was not liable for use and occupation.

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ACTION for use and occupation. The opinion and head note show the facts. The plaintiff had judgment below.

A: G. Green and H. Maltzberger, for plaintiff in error.

Jeff. Snyder and H. C. G. Reber for defendant in error.

PAXSON, J. The act of 1848 having secured to a married woman her separate estate, it was only fair to exonerate her husband from the payment of her debts contracted before marriage. This was an attempt to compel the husband to pay the rent of a house which his wife had leased some weeks prior to his marriage to her. It appeared that after the marriage the wife continued to occupy the demised premises, as she had occupied them for some time prior thereto. Her husband however did not live with her, at least not permanently; he visited her sometimes, and occasionally stayed all night. The court below held the husband liable for the rent, not because the landlord could recover against him upon the contract of lease with the wife made prior to the marriage, but for the use and occupation after marriage, on the ground of the husband's legal obligation to support and maintain his wife.

The error of this ruling is palpable. The duty of a man to support and maintain his wife is well settled, and may be enforced by legal process in case of his refusal or neglect to do so. But he was a stranger to this contract. The lessee was in possession of the premises under a lease when he married her. The contract and liability were hers. He no more assumed the payment of her liability under the lease than he did of her other debts, if any existed. It is true she lived in and enjoyed the use of the house for some months after her marriage and until her death. In like manner, her clothing purchased before was worn and used after marriage. If unpaid for the husband could not be held responsible for it.

There is nothing in the testimony of Ziegler, the landlord, from which a contract with the husband can be fairly implied. We need not discuss the question therefore how far a man may be liable upon his promise to pay his wife's ante-nuptial debt. He made no such promise, and without it he is under no legal duty to pay.

Judgment reversed, and a venire de novo awarded.

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STECKEL v. FIRST NATIONAL BANK OF ALLENTOWN.

(93 Penn. St. 378.)

Bank — liability for fraud of officers.

Plaintiff, a depositor in a National bank, requested a certificate of deposit drawing interest, for a portion of his deposit. The teller gave him a certificate purporting to be issued by B. & Co., a private banking firm, and informed him, in presence of the cashier of the bank, that this was the bank's certificate, upon which assurance the plaintiff accepted it. The members of the firm were the managing officers of the bank, but had a separate place of business in the same town. *Held*, that the bank was liable to the plaintiff for the amount of his deposit. (See note, p. 760.)

ACTION for a balance of a deposit of money. The opinion states the case. The plaintiffs had judgment for part of their claim below.

E. J. Fox, Evan Holbon and D. D. Roper, for plaintiffs in error.

Edward Harvey, R. E. Wright, Jr., and G. & H. Lear, for defendant in error.

PAXSON, J. The principal cause of complaint in this case is, that the learned judge of the court below withdrew from the jury the consideration of the question of fraud, upon the ground that there was not sufficient evidence to submit it. The plaintiffs kept an account with the corporation defendant, and were in the habit of making deposits and drawing checks in the usual manner. William H. Blumer was the president of the bank; his son, Jacob Blumer, was the cashier. Three of the directors, including the said William H. Blumer, composed the banking-house of William H. Blumer & Co., which carried on business but a few hundred feet distant from the First National Bank of Allentown. The plaintiffs having money on deposit with the bank, and being desirous of obtaining interest-bearing certificates therefor, called at the bank for that purpose. Dr. A. P. Steckel, one of the plaintiffs, testifies as to what occurred substantially as follows: "I went to the bank every week or two to make my deposits; sometimes in August, when I made deposit, I asked the teller, George Straub, Does the First

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National Bank take any money on certificates ? He said, Yes, sir; do you want to leave us some ? I said, No ; not to-day. I asked him whether the First National Bank issues certificates of deposit, and as a matter of course, pay interest ? and he said, Yes. Then I came there again in September, 1876, and made my ordinary deposit in the bank ; and after we were through, I said to the teller that I would take the First National Bank certificates for \$700 ; I filled out a check, and he handed me a certificate ; I looked at the certificate for \$700 ; it was to be made on demand, and asked him, Is this the First National Bank certificate ? The answer was, Yes, sir, it is. I then said, this reads Blumer & Co. ; I want this distinctly understood, I want nothing but the First National Bank certificate. He assured me that this was one and the same thing ; that it should pass to the credit of the company the same as it was before. With this assurance, I took that certificate. This was in the presence of the cashier of the bank, Jacob A. Blumer." Two other certificates, aggregating with the one above mentioned, the sum of \$3,000, were obtained under circumstances not essentially different. There was evidence that the president of the bank recognized them as binding upon the bank, and offered to reinstate the plaintiffs as they were before, when the bank examiner was through with his examination. That examination however resulted in the closing of the bank.

We must assume that the jury would have found the facts as testified to by the plaintiff Steckel. The facts established, we have a case of palpable fraud. It is not an answer to say the plaintiffs ought not to have been deceived, and with ordinary care would not have been. The fact that the Blumers were respectively president and cashier of the National bank, as well as leading members of the banking-house of Blumer & Co., was calculated to mislead and deceive ; and when told in positive terms that the certificates, although signed by Blumer & Co., were the certificates of the bank, the plaintiffs may readily have believed it was all right.

It was urged however that even if there was a fraud, it does not affect the bank ; that an agent can only act within the scope of his authority, and that a bank is not bound by the fraudulent representations of one or more of its officers.

There is no doubt as to the general rule that an agent can only bind his principal so long as he acts within the scope of his authority ; but we do not think the principle applies in this case. A bank

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is responsible for the safe-keeping of the money of a depositor, and it cannot set up the fraud of its own officers as an answer to a demand for repayment. Public policy forbids it.

The plaintiffs, after ascertaining the fraudulent character of the transaction, tendered the certificate to the bank, and demanded the payment of their original deposit. In other words, they rescinded the contract on the ground of fraud. If their allegations are true, they had a right to do so, and proceed upon the original cause of action.

The question of fraud should have been submitted to the jury. What has been said sufficiently covers the points involved.

Judgment reversed, and a venire facias de novo awarded.

NOTE BY THE REPORTER.—Two other cases were decided involving similar facts. In *Eiegler v. First National Bank of Allentown*, 93 Penn. St. 393, the facts were exactly the same, except that the plaintiff was unable to read. The court said: "When the plaintiff took his money to the First National Bank of Allentown, and handed it to the cashier for deposit, the bank became responsible therefor. The cashier was the executive officer of the bank, and authorized by the very nature of his office to receive money on deposit. After receiving it no trick or fraud on his part, by means of which the money was passed over to Blumer & Co., a firm in which the bank officers were largely interested, and appeared to have had the control, could absolve the bank from its liability. No class of men have the confidence of the people to a greater extent than bank officers. Depositors do not deal with them at arm's length, and can be imposed upon with the greatest ease by such officials. It would be monstrous to allow them to take advantage of the ignorant and unwary, by reason of their position and the confidence which it inspires. It was doubtless a misfortune to this bank to have unworthy officials, if such should prove to be the case. It certainly was unwise to permit its chief officers to occupy a dual position with divided interests, but the consequences resulting therefrom cannot be visited upon those who dealt in good faith with the bank."

In *Resh v. First National Bank of Allentown*, 93 Penn. St. 397, the defendant, who had money on deposit in the bank, when demanding payment thereof was induced by an officer of the bank to sign a promissory note, which was represented to him to be a receipt for the money. He was unable to read English. *Held*, that he was not liable to the bank on the note.

In *West v. First National Bank of Elmira*, 20 Hun, 408, the defendant was in the habit of issuing certificates of deposit, sometimes in the name of the bank, at other times in the individual name of its president, Van Campen, this course of business being known to and permitted by the directors. The plaintiff deposited money with defendant's teller, over the counter, and received a certificate of deposit purporting to be issued by Van Campen individually. He had previously made deposits, and received similar certificates, which had been paid on demand at the bank counter by the bank employees. He made the deposit on the credit of the bank, and accepted the certificate, supposing it the obligation of the bank. Van Campen was not present, his name was not mentioned, and the plaintiff knew him only as the president of the bank. *Held*, that he was entitled to believe the certificate that of the bank, and the bank was estopped to deny its liability on it. This decision was founded on *Coleman v. First National Bank of Elmira*, 53 N. Y. 888, where the facts were exactly similar. The court there said: "Leaving out of view the certificate, the liability of the defendant is clear. The bank received the money of the plaintiff as a deposit, and thereupon it became bound upon an implied contract to repay it upon demand."

"It is insisted however, that the certificate issued to the plaintiff at the time of the deposit conclusively establishes that the transaction was with Van Campen and upon his

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sole credit. The certificate is said to be a written contract, by which alone the right of the plaintiff is to be determined, and that parol proof that the deposit was made with the bank or tending to establish a liability of the bank was inadmissible, as in violation of the rule that parol evidence cannot be given to contradict a written instrument. The rule that when parties have reduced a contract between them to writing, the writing alone in the absence of fraud or mistake is to be referred to, to define their respective rights and liabilities, and that all preliminary negotiations are to be deemed merged in, and if inconsistent therewith superseded, by the written contract, is supported as well by considerations of policy as by judicial decision. But assuming that the certificate signed by Van Campen when accepted by the plaintiff became a written contract between them, parol evidence that the bank received the money as a deposit did not contradict any written agreement between the bank and the plaintiff, for they had made none. The real issue on the trial was whether the bank or Van Campen was the depository. Unexplained, the fact that the plaintiff accepted the certificate of Van Campen was strong if not conclusive evidence that the bank was not a party to the transaction ; but it was evidence only, and was subject to explanation by parol proof, without violating the rule referred to. In *Barry v. Ransom*, 12 N. Y. 464, DENIO, J., in speaking of the rule, says : ' It is a valuable principle, which we would be unwilling to draw in question, but we think it is limited to the stipulations between the parties actually contracting with each other by the written instrument.' The rule does not preclude a party, who has entered into a written contract with an agent, from maintaining an action against the principal, upon parol proof that the contract was made in fact for the principal, where the agency was not disclosed by the contract, and was not known to the plaintiff when it was made, or where there was no intention to rely upon the credit of the agent to the exclusion of the principal. Such proof does not contradict the written contract. It superadds a liability against the principal to that existing against the agent. That parol evidence may be introduced in such a case to charge the principal, while it would be inadmissible to discharge the agent, is well settled by authority. *Ford v. Williams*, 21 How. 207 ; *Higgins v. Senior*, 8 M. & W. 834 ; *PARKE, J., Short v. Spookman*, 2 B. & Ad. 962 ; *Taintor v. Prendergast*, 3 Hill, 72 ; *Gates v. Brower*, 9 N. Y. 205.

"The jury having found that the money was in fact deposited with the bank, the case then in one aspect is that of a depositor taking the personal certificate and obligation of a person who was at the time the chief financial officer and agent of the bank for its repayment. If he did this under circumstances indicating an intention to give the sole credit to Van Campen, knowing, as he did, that the bank was the real principal, then his election would bind him, and he could not subsequently resort to the bank on the insolvency of the agent. *Patterson v. Gandasequi*, 15 East, 62 ; *Addison v. Gandasequi*, 4 Taunt. 573. But one who deals with an agent is not concluded from resorting to the principal unless it distinctly appears, that with full knowledge of all the facts, he elected to take the sole responsibility of the agent, and that he designed to abandon any claim against the principal. *Thompson v. Davenport*, 9 B. & C. 78. In this case, upon the facts found by the jury, no such intention can be inferred. If the plaintiff had examined the certificate he would have been apprised of the fact that it purported to be the individual obligation of Van Campen. But he did not do so. He had a right to suppose that it was the proper acknowledgment of the bank with which the money was deposited. The doctrine of constructive notice from the possession of the certificate, would be misapplied, if in this case it should be held to exempt the bank from liability."

In *First National Bank of Allentown v. Williams*, Pennsylvania Supreme Court, March 10, 1882, A., an experienced business man, called upon B., the president of a bank, and inquired whether the bank paid interest on deposits. B. replied "No, but we will give you a certificate that will." A. accordingly gave B. a sum of money, and received in return an interest-bearing certificate of deposit in the banking house of B. & Co., of which firm B. was a member. A. then remarked that the certificate was one of deposit in said banking house and not in the bank, and expressed surprise. B. assured him it was all the same thing, showed him that B. & Co. owned a great part of the bank stock, and informed him that he could get his money at the bank when he wanted it. B. being satisfied then left with his certificate. The firm of B. & Co. afterward became insolvent. In an action by A. against the bank to recover the amount of his deposit, held, that there

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was no evidence of a contract of deposit between A. and the bank, nor any circumstances from which a jury might infer that A. had been deceived into believing that there was such a contract, but that the contract was solely with B. & Co., and that therefore plaintiff was not entitled to recover. The court said: "The learned judge who tried this cause below was evidently of the impression that it came within the ruling of *Steckel v. Bank*, 93 Penn. St. 376, and *Ziegler v. Bank*, id. 393. There is however a marked distinction between the cases. In those cited there was a positive assertion on the part of the bank officers that the certificates in question were the certificates of the bank, and this assertion was made under circumstances which render it at least probable the parties were misled by it. We therefore held there was a question of fraud, which ought to have been submitted to the jury. In the case in hand, it is evident from the testimony of the plaintiff below that he knew he was getting the certificate of Blumer & Co., and not of the bank. In the first place he was distinctly told the bank would not pay interest, but that he could have a certificate bearing six per cent interest; when it was handed him, he looked at it and said 'What is this? This is Wm. H. Blumer & Co.' to which the president of the bank replied: 'It is all the same thing; we own the bank ourselves, and you will get your money in the First National Bank at any time you want it.' It further appeared that Mr. Blumer showed him the bank statement, and then qualified his remark as to the ownership by saying that his firm owned nearly all the bank. This last statement, while not literally true, was substantially so. It was in evidence that the firm of Wm. H. Blumer & Co. owned 1560 shares of the 2500 shares composing the capital of the bank. There was no evidence that the plaintiff was told that his certificate was the certificate of the bank. The statement of Blumer that 'it was all the same thing' could not have misled him for the reason that it was qualified and explained by the remark that they, the firm of Blumer & Co., owned nearly all the bank. The obvious inference from the remark is, not that the certificate was issued by the bank, but that it was equally good. It is difficult to see any thing in this interview that could have deceived a man of even ordinary intelligence. The plaintiff was a business man, accustomed to large dealings with the bank, and therefore less liable to be deceived. We fail to see any evidence of a contract with the bank. It was therefore error to submit this question to the jury."

KRAUSE V. COMMONWEALTH.

(93 Penn. St. 418.)

Criminal law — larceny — by bailee.

The owner of horses delivered them to defendant under an agreement that the defendant was to buy them, the horses to remain the property of the owner till paid for, and to be returned at a specified period if not paid for. The defendant refused to pay for them, or return them. *Held* not larceny, nor larceny by a bailee.

CONVICTION of larceny. The opinion states the case.

Butz & Schwartz and *William H. Snowden*, for plaintiff in error.

Milton C. Henninger, district attorney, for Commonwealth.

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TRUNKEY, J. The indictment contained two counts: 1. Larceny; 2. Larceny by bailce; the alleged stolen property was the same in both. To the first count Krause pleaded a former acquittal, on which plea verdict and judgment were rendered in his favor. He was then tried and convicted on the second.

In the charge of the court the Commonwealth's case, as proved, was fairly stated thus: On December 13, 1878, the prosecutor sold and the defendant agreed to purchase the two horses; that the price agreed upon was \$150, to be paid on delivery, the prosecutor to take the horses to the defendant's stable, at Allentown, the next day and receive the money; that he took them to said stable and left them; that other interviews and negotiations followed, continuing up to the Thursday of the next week, when the horses disappeared from the stable, and were sold or converted by the defendant to his own use. That when the horses were taken to the stable the defendant had only \$25, and it was then agreed that the horses should continue to be the property of Deemer, who would not sell them except for cash; that he would wait till the following Tuesday evening, when, if the defendant should not have the money to buy the horses, they were to be taken to Deemer, at Schœnersville, and with this understanding Deemer accepted the \$25; that on Tuesday evening the defendant took one of the horses to Schœnersville, and the next evening went again, taking the other horse, on each occasion taking the horse back with him; that on Thursday Deemer went to Allentown for his horses, and offered to return the \$25 to the defendant, but he refused to give them; and that the original contract was never changed, the horses were sold only for cash, and the extension of time was given to enable the defendant to buy and pay for them. Such were the alleged facts which now must be taken as true.

Having acquitted the defendant of larceny of the horses, the Commonwealth put him to another trial and convicted him of larceny, in stealing the same horses, under section 108 of the Crimes Act of 1860. Villainous as his conduct was, this conviction ought not to stand, unless he was a bailee within the intendment of the act. The word "bailee" is a legal term, to be understood in its generally accepted sense among jurists, and if it be doubtful whether a case be included it shall be excluded, in the construction of a criminal statute. Blackstone defines bailment as "a delivery of goods in trust upon a contract, express or implied, that the trust shall be

faithfully executed on the part of the bailee;" Story, "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust;" Jones, "a delivery of goods in trust on a contract, express or implied, that the trust shall be duly executed, and the goods re-delivered as soon as the time or use for which they were bailed shall have elapsed or be performed;" and Kent, "a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered." Mr. Edwards, in his work on Bailment, § 2, remarks: These definitions agree in nearly all essential particulars, and disagree in two or three respects. Jones and Kent assume the property is to be returned, while Blackstone and Story include contracts under which no such return is contemplated. Story intends to include among contracts of bailment a delivery of goods for sale; and Kent intentionally limits his definition so as to exclude that species of contract. "In general terms it may be said that the delivery of goods or any other species of personal estate for use, keeping, or on some other trust, where the general property does not pass, creates a bailment. A delivery of chattels upon a sale made on condition that the title shall pass on the payment of the purchase-money at a future day, is something more than a bailment; it gives the buyer a conditional title. If the contract give the buyer a definite credit or a reasonable time within which to pay, it gives him a transferable interest in the chattels until the credit expires, and the property in them as soon as he pays the price."

Authors of received authority generally specify five sorts of bailment, namely, *depositum*, *mandatum*, *commodatum*, pledge and hiring; and as severally defined, in each the entire property of the thing bailed remains in the bailor, the possession only is given to the bailee, who is to return or deliver the thing itself as soon as the purpose of the bailment shall be answered. In this State it is settled that the bailee of goods, who uses and enjoys them as if his own, cannot divest the title of the bailor by a sale to an innocent person; nor can a creditor of the bailee seize them in execution of his debt. When delivered under a contract of bailment, the owner will be entitled to them against everybody. But a delivery on a conditional sale, the property to remain in the vendor until the goods are paid for, with right to reclaim them, is

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void as respects the vendee's creditors, or an innocent purchaser from him. The delivery being on the foot of a purchase, the vendor's right, as against the vendee's creditors, is regarded as a lien for the purchase-money. *Chamberlain v. Smith*, 8 Wright, 431; *Haak v. Linderman*, 64 Penn. St. 499; s. c., 3 Am. Rep. 612. By the terms of the contract the seller may retain the right of property in the goods till paid for, as against the purchaser, and in default of payment, he may reclaim them, or use civil remedies for recovery of possession; but the contract does not make him a bailor, as respects other persons, nor the purchaser a bailee in the sense of the word as used in the statute.

Our statute, as shown by READ, J., in *Commonwealth v. Chathams*, 14 Wright, 181, is taken from the English statute; and in that case the interpretation of the words "bailee" and "bailment," as fixed by the English decisions, was adopted, which decisions were cited, showing that the words must be interpreted according to their ordinary legal acceptation, that "bailment relates to something in the hands of the bailee, which is to be returned in specie, and does not apply to the case of money in the hands of a party who is not under any obligation to return it in precisely the identical coins which he originally received;" that "to bring a case within this clause, in addition to the fraudulent disposal of the property, it must be proved: First. That there was such a delivery of the property as to divest the owner of the possession, and vest it in the prisoner for some time; Secondly. That at the expiration or determination of that time the same identical property was to be restored to the owner."

The term "bailee" is one to be used, not in its large but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods *bona fide*, and then fraudulently convert. Where it does not appear that a fiduciary duty is imposed on the defendant to return the specific goods of which the alleged bailment is composed, a bailment under the statutes is not constituted. Whart. Crim. Law, § 1855 (8th ed).

The bargain was struck for a sale of the horses for \$150, payable on delivery. At the time stipulated Deemer delivered the horses, Krause paid \$25, they agreed that the property should continue in Deemer, and on the next Tuesday Krause would pay the balance or return the horses. He refused to do either. The original contract was not changed—time was extended to Krause to enable

him to pay the money. If there was a delivery at all, it was on the footing of the sale. There was no agreement to sell at a future time — a mere contract that the buyer would pay the balance of the price or return the property, in the meantime the title to be in the seller. Payment would have been a complete performance. Krause was not bound to return the identical property. He had a transferable interest until the credit expired, and he or his transferee would have had clear title the instant of payment. This was something more than a bailment, and Krause was not a bailee in the statutory sense.

In favor of the liberty of the citizen, the court may, and in a proper case should, declare the evidence insufficient to convict. *Pauli v. Commonwealth*, 8 Norris, 432. We are of opinion that the defendant's first point should have been affirmed.

Judgment reversed, and the record, with this opinion setting forth the causes of reversal, is remanded to the Court of Quarter Sessions of Lehigh county for further proceeding.

Judgment accordingly.

CRAWFORD V. SCOVELL.

(94 Penn. St. 48.)

Insanity — deed — revocation — restitution.

An insane grantor, whose insanity was known to the grantee, at the time of the grant, and who has not ratified his conveyance after restoration to reason, may avoid the conveyance without restitution.

EJECTMENT. The opinion states the point. The defendant had judgment below.

Sittser & Harding, for plaintiff in error.

W. E. & C. A. Little and *William M. Piatt & Sons*, for defendant in error.

TRUNKEY, J. A formal offer was made to prove that Ira Crawford was insane when he executed the deed to John Scovell, that Scovell knew of the insanity and procured the deed by fraud. This was overruled on the objection that the offer was not full

enough, in that before the plaintiff can avoid the deed he must have offered to restore its consideration; that a plaintiff cannot allege his own insanity against his deed, and that the witness was incompetent because of his instrumentality in perpetrating the fraud. No objection was made that the specific acts were not set out in the offer, and it is too late to object now. That the witness was competent is not doubtful. As the case comes it presents these questions: 1. Can a plaintiff, who brings suit himself, prove his insanity to defeat his deed given in evidence by the defendant? 2. Can he prove that the defendant knew of the insanity when he took the deed? 3. May he show the deed was procured by fraud? and 4. Must he restore the consideration before bringing suit?

1. It is a general rule that a grantor in a deed may avoid his conveyance by proof that he was *non compos mentis* at the time of its execution. *Bensell v. Chancellor*, 5 Whart. 371; 2 Kent Com. 451; *Gibson v. Soper*, 6 Gray, 279. Like the deed of an infant, a lunatic's deed may be ratified and confirmed. Where there is no evidence of ratification after restoration to reason, it is impossible, upon legal principles, that the estate passed to the grantee in the deed. An insane person is incapable of making a valid deed, for he wants the consenting mind. "The law makes this very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of mature age and sound mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain, which the infant may avoid; the sane to the obligation from which the insane may be loosed. It does not mean to put them on an equality. On the other hand, it intends that he who deals with infant or insane persons shall do it at his peril. Nor is there practically any hardship in this, for men of sound minds seldom unwittingly enter into contracts with infants or insane persons." *Gibson v. Soper, supra*.

In *Molton v. Camroux*, 2 Exch. 487, an action to recover money paid for annuities, it was held that when a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and said property has been paid for and enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterward be set aside, either by the alleged lunatic or those who represent him. Like doctrine prevailed in *Beals v. See*, 10 Barr. 56. The decision in *Lancaster*

County Nat. Bank v. Moore, 28 P. F. Smith, 407 ; s. c., 21 Am. Rep. 24, rests on the same principle — there was neither fraud nor knowledge of the insanity. Without inconsistency, in *Moore v. Hershey*, 9 Norris, 196, it was ruled that it is competent in an action by an indorsee of a note made by a lunatic, for the lunatic to defend, either by showing that the indorsee had knowledge of the lunacy, or that the note was originally obtained fraudulently, or without proper consideration. PAXSON, J., said, “I know of no case in which it has been held that a lunatic, when sued upon his contract, may not show want of consideration.” After speaking of the rule which had been urged in favor of the plaintiff, he adds, “We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to the case of commercial paper made by madmen.”

In *Elliot v. Ince*, 7 De G., M. & G. 475 (487), it is said that *Molton v. Camroux* was called a decision of necessity, and it is suggested that the same principle might apply to sales of land or mortgages. But in this country that rule is not universally extended to sales of personalty, and is not applied to conveyances of real estate. However on that principle, or the one in *Bensell v. Chancellor*, the offered testimony was admissible for the purpose of avoiding the deed.

The defendant urged that the plaintiff did not propose to show he had recovered his reason, and upon the truth of his offer, the law presumes he continues insane ; wherefore he cannot maintain the action and allege his insanity. Under the general issue in assumpsit, the defendant may show, in avoidance of the contract, that he was insane at the making of it. If he continues a lunatic he may not appear and plead by attorney, and if it so appears on examination the plea by attorney may, before judgment, be treated as a nullity, and a guardian be appointed who will be entitled to plead *de novo*. *Mitchell v. Kingman*, 5 Pick. 431. So, when a plaintiff is met by a deed, good on its face, he may avoid it by proof that he was insane when it was executed. If his reason has been restored he has no other means of protection. A committee cannot be appointed for a sane man because he was at one time insane. He must bring suit himself to recover his rights, and may prove insanity to avoid a deed set up against him, on the same terms as if he were defendant in the action, and the plaintiff were supporting his case with the same deed. The principle contended

for by the defendant would deprive a man, who had been *non compos mentis*, of remedy for recovery of his property, without fault on his part, and might work his utter ruin. If at the trial he should appear to be insane, the court would treat him and his cause as it would any other plaintiff suffering under like malady.

2. From the foregoing it is manifest that it is competent to prove the defendant had knowledge of the insanity when he took the deed. If unnecessary for its avoidance, it may be material on the question of restoration of the consideration. He who knowingly deals with a madman takes the risk of losing.

3. For like reason it may be proved that the deed was procured by fraud. Even the holder of negotiable paper may fail to recover because the maker was insane, when but for that there would be no defense to his action on the ground of fraud or want of proper consideration. Proof that the bargain was unfair and unconscionable would be pertinent in determining the equitable claim of the defendant.

4. The consideration need not be restored before commencement of the action, nor after, in all cases. To say that an insane man before he can avoid a voidable deed, must put the grantee in *statu quo*, would oftentimes be to say his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain so as to be able to make restitution. One of the obvious grounds on which the deed of an insane man is held voidable is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity which made the deed void may have wasted the price, and made the restoration of the consideration impossible: *Gibson v. Soper, supra*. In that case the defendant contended there could be no recovery because restitution had not been offered, and thereupon the plaintiff proposed, if any thing was due, to make such restitution and repayment in such way and manner as the court should direct. The question was, as it is here, whether restoration is a condition precedent to recovery, and not whether under any circumstances a grantee, after avoidance of the deed, may recover back a part or the whole of the price paid. It was said that if the grantor, having been restored to sound mind, still retains and uses the consideration of the deed without offer to restore, or seeks to enforce the securities, or avail himself of the contract which constituted such con-

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sideration, such conduct may furnish satisfactory, and it may be, conclusive evidence of a ratification. That would be an entirely different case from one where the grantor wasted the price he received before his reason was restored. Although the deed has not been ratified, and consequently the plaintiff is entitled to recover the land, should it appear that in equity the whole or a part of the consideration ought to be restored or repaid, under the practice in this State there would be no difficulty in doing justice between the parties by a conditional verdict and judgment.

Judgment reversed, and venire facias de novo awarded.

BROWN V. JAQUETTE.

(94 Penn. St. 113.)

Landlord and tenant — partnership — working land on shares.

An agreement by one to farm the land of another for a year, for one-half the products, each furnishing half the seed, stock, etc., the farmer to furnish the implements and working animals and all the labor, and pay the road tax and half the other taxes, and to submit statements and settle quarterly, is a lease and not a partnership.*

CASE. The opinion states the facts. The defendant had judgment below.

J. B. Thayer, for plaintiffs in error.

E. H. Hall, for defendant in error.

PAXSON, J. The agreement between Joseph Johnson Brown and Samuel P. Jaquette, of October 20, 1864, is a lease of a farm upon the shares. See *Steel v. Frick*, 6 P. F. Smith 172. Jaquette agreed to farm the land for Brown, for which he was to have one-half the proceeds; each party furnishing one-half the seed, stock, poultry, hogs, etc. The agreement was for the term of one year, commencing on the first day of April, the usual time for letting farms in Pennsylvania. While it lacks some of the formality of a lease, it contains all the essential requisites of such an instrument. The reservation of one-half the products of the farm is sufficiently cer-

* Compare *Reynolds v. Pool* (84 N. C. 37), 37 Am. Rep. 607, and note, 704.

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tain because it may be reduced to a certainty. Thus it was held in *Fry v. Jones*, 2 Rawle, 11, that the lease of a mill for "one-third of the toll which the mill grinds," was a good reservation of rent, and could be distrained for. See also *Jones v. Gundrim*, 3 W. & S. 531.

It was urged however that the agreement created a partnership *inter se*. That such was not the intention of the parties is too plain for argument. Such or similar agreements are in constant use in this State for the letting of farm lands, and it was never supposed they created a partnership. A careful examination of its terms shows that it lacks every essential feature of a copartnership. There is no division of profits, no responsibility on the part of Brown for losses, and no joint ownership in any thing. The landlord is to receive "one-half the product" of the farm. This must not be confounded with profits. The product of the farm is one thing; the profit is another, and a very different matter. The product may be large, the profit inconsiderable. Again, each party is to find one-half the stock. This does not make them joint owners of the stock. They may become so by means of a joint purchase and a joint holding, but under the agreement, if the landlord furnishes one-half the horses, cows and other stock, such half remains his property, and the tenant has no interest therein beyond the right to use the same under the terms of the lease.

[Omitting a minor consideration.]

Judgment affirmed.

 BOROUGH OF NORRISTOWN v. FITZPATRICK.

(94 Penn. St. 121.)

Municipal corporation — firing cannon in street — nuisance — police.

A crowd of men, somewhat intoxicated but not otherwise disorderly, fired a cannon for several hours in the streets of a borough, not in pursuance of any public celebration, and in so doing negligently injured a citizen passing along the street. A police officer stood by, but made no effort to suppress the firing. The borough was authorized to appoint policemen and remove nuisances. *Held*, that the borough was not liable in damages to the injured party.*

*To same effect, *Grumbine v. Mayor* (3 McArth. 578), 29 Am. Rep. 626. See *Shultz v. City of Milwaukee* (49 Wis. 254), 85 Am. Rep. 779, and note, 781.

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CASE for personal injuries. The head note and opinion state the facts. The plaintiff had judgment below.

B. M. Boyer and George N. Corson, for plaintiff in error.

G. R. Fox and L. M. Childs, for defendant in error.

GORDON, J. The injury to the plaintiff, complained of in this suit, was occasioned by the firing of a cannon, in a public street of Norristown, by an assemblage of citizens, on the evening of the 31st of December, 1875. The business in which they were thus employed was undoubtedly of an unlawful character, and each and every person therein engaged was personally liable for any damage resulting therefrom. But that the municipality was so liable is another and a very different question. Municipalities are not conservators of the public peace; they may or may not have the power to appoint police officers, but if they have such power, and do make such appointments, the powers of the officers so appointed are derived not from municipal ordinances, but from the common law and acts of assembly. Hence, it was held in *Elliott v. City*, 75 Penn. St. 342; s. c., 15 Am. Rep. 591, that the city was not answerable for the negligent act of a police officer. A like doctrine, that police officers appointed by a city are not its agents or servants, and that it is not therefore responsible for their unlawful acts when in discharge of their duty, may be found in 2 Dill. Mun. Corp., § 773. The law upon this subject has been well stated by Chief Justice BIGELOW, in the case of *Buttrick v. City of Lowell*, 1 Allen, 172. "Police officers," says the learned chief justice, "can in no sense be regarded as servants or agents of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment."

It is thus apparent from authority, that for the neglect of the police officer, who stood by and permitted the firing of the gun to go on, the borough of Norristown cannot be made liable. But if

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it is not responsible for the consequences of his neglect, then it is altogether exempt from responsibility. For if the municipality can act at all in the suppression of riots and other breaches of the peace, it must be through its burgess, justices, constables and policemen, and if they neglect their duty and refuse to act, the municipality is powerless. Then upon what ground can the defendant be held liable for the damages suffered by the plaintiff? Certainly not upon any principle of common law, for we all know that for damages resulting from the conduct of a mob or unlawful assembly neither city nor county, borough nor township, can be held, except by special statute. Is it then on the ground that the assemblage complained of obstructed the public street, and so became a nuisance which the borough was bound to remove? But the difficulty of supporting the case on this theory is twofold: First, the jury has found that the street was not so obstructed that persons could not readily pass and repass, and that the injury resulted not from any such obstruction, but from the act of firing the gun. Second, admitting that a mob is a nuisance, and that of the worst kind, nevertheless it is one that a municipal corporation cannot abate by the use of ordinary appliances such as suffice for the removal of natural or material obstructions in or near a highway; resort must therefore be had to the police force, but as we have already seen, for the doings or misdoings of those who compose this force the municipality is not liable.

The difference between those cases in which cities, boroughs and townships have been held responsible for neglect, and the one in hand, is very wide. The maintenance and repair of highways, sewers, wharves, etc., belong to their immediate jurisdiction, and over them they alone have control, hence their responsibility. But the conservation of the peace is a great public duty, put by the Commonwealth into the hands of public officers: the judges, justices of the peace and mayors, the governors, sheriffs, constables and policemen; hence cities and boroughs can no more be charged with damages resulting from their misconduct than can counties, townships, or the State at large.

The judgment of the court below is now reversed and set aside, and it is ordered that judgment be entered on the special verdict for the defendant.

Judgment reversed.

COMLY v. HILLEGASS.

(94 Penn. St. 122.)

Wager — horse-racing — premium.

A check given to an agricultural society to enable the drawer to enter his horse in competition in "a trial of speed" at an exhibition for a premium offered by the society, is void under the statute against wagers and horse-racing. (See note, p. 775.)

ACTION on a check. The head note and opinion state the point. The defendant had judgment below. The court below delivered an opinion, in which it said: "A wager is defined in Bouvier's dictionary as 'a bet; a contract by which two parties or more agree that a certain sum of money or other valuable thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event.' A wager at common law was not void unless the event upon which it depended was *contra bonos mores*. Therefore a wager upon the event of a horse-race was a lawful contract which could be enforced by legal remedies, and the sum or thing wagered could be recovered by action. As civilization developed, more correct moral views and a broader spirit of public policy prevailed. It was seen that gambling in any form was most demoralizing to the gambler; and very early statutory action was taken by the British Parliament. The progress of legislation on the subject will be found fully traced in Jacob's Law Dictionary, tit. Gambling.

"By the act of February 17, 1820, § 1, 7 Smith's Law, 244, horse-racing was declared a public nuisance and offense against the State.

"By the second section of the act the horses thus employed were forfeited. By the third section, all wagers on horse-races are declared void, and so also all contracts in consideration of such wagers. By the third section all moneys paid could be recovered. By the fourth section, all contributors to a purse, and for a horse-race, and all persons collecting money for such purposes, were made liable to a penalty. By section six, all advertisers of a race, and those who set them up, were subject to a penalty. These are our statutes against gaming and horse-racing, and I have traced them with some care, many of them not being found in the general digest.

IT IS NOW TIME TO TURN TO THE CASE STATED. It is very apparent, under the statutes cited as to horse-racing, that the trials of speed provided for and to enter which the check of the plaintiff was given, are nothing but horse-racing. They are nuisances under the first section of the act of 1820 already cited. All wagers and bets depending upon such 'trials of speed' so-called, horse-racing in reality, and all executory contracts in relation thereto, are void, under section three of that act; and the horses engaged in such races are forfeited. A purse to be trotted for is gambling under the laws of Pennsylvania. The winner cannot recover the premium, purse-stakes or prizes, unless the company chooses to pay him. The horse of each contestant is forfeited, and the whole arrangement is a palpable evasion of the law. But there can be no evasion of the laws against gambling, as it has been well ruled in *Wagonseller v. Smith*, 7 Watts. 343. The court in that case in a *per curiam* opinion well say: 'The act was intended to avoid all bets, paid or unpaid, and to suppress any thing connected with the practice. It is the duty of the courts therefore to give it full effect, and not to force an actual wager into the similitude of something else.' To the same effect, and broadly sustaining this position, are the following cases cited by the defendant: *Mount v. Wait*, 7 Johns, 434; *Campbell v. Richardson*, 10 id. 406; *Brua's Appeal*, 5 P. F. Smith, 294; *Maxton v. Gheen*, 25 id. 166; *Kirkpatrick v. Bonsal*, 22 id. 155; *Gibbons v. Gouverneur*, 1 Denio, 170; *Unger v. Boas*, 1 Harris, 601; *Mytinger v. Springer*, 3 W. & S. 405."

Geo. W. Rodgers and J. P. Hale Jenkins, for plaintiff in error

B. M. Boyer and L. M. Childs, for defendant in error.

PER CURIAM. It is very evident that the check given by the defendant to pay the entrance fee, to enable him to enter his horse at the exhibition, was for an illegal purpose. The object is stated to have been to entitle him to have his horse entered to compete for the premiums offered by the society for trials of speed. In plain English, there was to be a horse race — which beyond all question is in violation of the laws of this Commonwealth. It is directly within the principle of *Unger v. Boas*, 1 Harris, 601.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Harris v. White*, 81 N. Y. 522, where Chief Judge FOLGER expounds the law of horse-racing in this State in an elaborate opinion, the action was by

a jockey against his employer for wages. The defense was that the contract of employment was in violation of the statute, which declares that all wagers, bets or stakes, on any race shall be unlawful. The testimony showed that the agreement was to drive in races for purses, prizes, or premiums, and the court held that a purse, prize or premium, is not a bet or stake within the statutory prohibition. In the case of a bet, as defined by the chief judge, "each party gets a chance of gain from others and takes a risk of loss of his own to them." But "a purse, prize, or premium, is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, but must certainly lose it."

The court declined to express any opinion whether "a prize, purse, or premium, to be given on a contest in speed is not a 'reward,' within the meaning of the statute." On the precise point of the principal case the court said: "It is urged that the payment of entrance fees by the defendant for his horses was a staking of so much of his own money upon the result. So it might have been, if the entrance fees went immediately to make up the purse trotted for. They did not, certainly not specifically, make up the purse. They were the purchase of a privilege to enter for the race and to contest for the purse, the giving of which is made lawful by statute law. They were an expense to the defendant, in kind, like any other attending the keeping and travelling about with his horses for a compensation now in some cases made lawful. They were one of the means, doubtless, by which these associations authorized by law supplied themselves with money to provide and keep up their grounds and tracks, and by the offer of premiums entice the owners of horses to come together for real or simulated contests in speed. The fees went into the treasuries of the associations and the prizes came out of those treasuries; but the fees were not money paid, as in *Gibbins v. Gouveneur*, 1 Denio, 170, for the express purpose of making a stake to be specifically trotted for, and for no other purpose, and with the previous agreement that the very sums thus paid should form the stake, and to go, the whole of it, to the winner of the race. Those associations exact a fee at the gates of their grounds from all coming in to behold the contest, and that goes into and comes out of the treasury, as do the entrance fees on horses, and mingles with them in the premiums. Does the payment of such a fee at the gate make the spectator a contributor to the purse within the meaning of sections 57 and 58 of the act of racing of animals, so that he forfeits \$40 and the amount that he pays, to be sued for and recovered by the poormaster? Besides, the law allows those associations to charge for an admission to their grounds, and also for the use of them, or any part of them, and the track is a part of them, and the entrance fee is paid for the use of it on a specified occasion. We think that it would be a stretching of the statute, to make it cover the facts which it would not otherwise fit, to say that the entrance money paid by the owners of horses going into the treasuries of these associations and mingling with their funds elsewhere got, were, within the purview of this penal statute, bets or stakes for which the animals were trotted."

In *Deller v. Plymouth County Agricultural Society*, a recent case in the Wisconsin Supreme Court, it was held that offering a premium for the winner in a horse-race at an agricultural fair is not a bet or wager, and is not unlawful. The court said: "It is made the duty of such societies to 'offer and award the premiums for the improvement of stock.' That an improvement in the size, strength, and capacity of horses is desirable there can be no doubt. Why not also in speed? Counsel practically concede this is so, but any such an improvement is less desirable than weight, strength, style and tractability. This may be true, but why should 'style' be regarded as a more desirable improvement than speed? However this may be, the defendant, we think, had the power to determine that to increase the speed of horses was a desirable improvement. The means by which this was to be accomplished is discretionary; that is, the society must determine in what way the desired result can be best reached. Should it be thought best to offer a premium for a trial of strength the society has the power to do so. It follows, we think, a premium may be offered for a trial of speed. It matters not what it may be called, unless it is prohibited by statute, or is contrary to public policy."

"Gambling or the making of any bet or wager is prohibited by statute. Code, § 4060. But horse-racing is not, except in a public highway. Code, § 4071. The offering of a premium is not a bet or wager. 'In a wager or bet there must be two parties, and it is

known before the chance or uncertain event upon which it is laid is accomplished who are the parties who must lose or win. In a premium or award there is but one party until the act, thing, or purpose for which it is offered has been accomplished. A premium is an award or recompense for some act to be done. A wager is a stake upon an uncertain event.' *Alford v. Smith*, 63 Ind. 58; *Harris v. White*, 81 N. Y. 532. The only case coming under our notice which apparently holds otherwise is *Bruneau Agricultural and Breeder's Association v. Ramsdell*, 24 Mich. 441. In that State however there was a statute prohibiting 'all running, trotting or pacing of horses * * * for any bet * * * or award,' and it was made a penal offense to contribute or collect any 'money, or goods, or things in action for the purpose of making up a purse, plate, or other valuable thing to be raced for, * * * contrary to law.' This statute is much broader than ours, and therefore the cited case is not applicable."

In *Alford v. Smith*, 63 Ind. 58, it was held that a premium offered by a trotting association for "the best and quickest time," or a certain rate of speed in a proposed trial of speed of horses, is not a bet or wager and is not unlawful. The court said: "There is a clear distinction between a wager or a bet, and a premium or reward. In a wager or a bet, there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished, who are the parties who must either lose or win. In a premium or reward, there is but one party until the act, or thing, or purpose, for which it is offered, has been accomplished. A premium is a reward or recompense for some act done: a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event. The two need not be confounded. Nor can we see any thing unlawful, or against public policy, in the facts alleged in the complaint. Under our statutes encouraging agriculture, and authorizing public fairs, premiums are offered for the best draft horse, saddle horse, trotting horse, the best stock for this or that purpose. These premiums are certainly not wagers. As well might we call an insurance policy a wager, because it is to be paid on an uncertain event, as to call a premium a wager because we do not know who will be entitled to it until the event happens. We see no difference indeed in principle, between a premium offered by an authorized corporation, and one offered by a private partnership. Neither are wagers, nor are they unlawful."

In *Bruneau Agricultural, etc., Association v. Ramsdell*, 24 Mich. 441 (the provisions of the statute are given in the Wisconsin case above), the court said: "Now it is very clear that the racing of the horses on the occasion alluded to, under the regulations of this association, and the premium given to the owner of the winning horse, as well as the mode of raising that premium, come directly within the express prohibitions of this statute. It is none the less a race because the association chose to designate it a 'trial of speed,' and pretend to give the premium for the best horse, when the trial of excellence is determined by the greatest speed. The 'premium' is but another name for the 'purse,' 'stakes,' or 'reward to the owner of the animal which shall excel in speed;' and the mode of raising this 'purse,' 'stakes,' or 'reward,' comes within the express prohibitions of the third section."

The deposit of an entrance fee to enable the depositor to compete for a prize in an athletic contest is not a bet. *Costello v. Curtis*, New York Supreme Court, 1881.

RENNYSON'S APPEAL.

(24 Penn. St. 147.)

Ancients lights.

No grant of light and air will be implied beyond what is absolutely necessary to the enjoyment of the premises conveyed.*

* To same effect, *Lapere v. Luckey* (23 Kans. 534), 33 Am. Rep. 196.

BILL to restrain the erection of a house. The opinion states the point. The bill was dismissed below, the court giving the following opinion :

“It is certainly true, that the question presented by this record has not been definitely ruled in Pennsylvania; and it is equally true that the English authorities have not been recognized or adopted by our court of last resort. The doctrine of ancient lights, and the right to light and air, by prescription, has as yet no recognition in our Commonwealth. *Hazlett v. Powell*, 6 Casey, 296; *Wheatley v. Baugh*, 1 id. 528; *Hoy v. Sterrett*, 2 Watts, 331; 27 Am. Dec. 343.

“In *Wheatley v. Baugh*, *supra*, LEWIS, C. J., says: ‘The Roman law, founded upon an enlightened consideration of the rights of property, declared, “that he, who in making a new work upon his own estate, uses his right without trespassing either against any law, custom, title or possession which may subject him to any service toward neighbors, is not answerable for the damages which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others without any advantage to himself. He may raise his house as high as he pleases, although by the elevation he should darken the light of his neighbor’s house.’ * * * These principles of the civil law are also the recognized doctrine of the common law; *Bury v. Pope*, 1 Cro. Eliz. 118; *Parker v. Foote*, 19 Wend. 309; 2 Watts, 331; *Greenleaf v. Francis*, 18 Pick. 121. It is true that several English *nisi prius* decisions introduced a modern doctrine in relation to ancient lights, in opposition to that held in the reign of Queen Elizabeth by all the judges in the Exchequer Chamber; 1 Cro. Eliz., *supra*. But the modern doctrine was never recognized by the King’s Bench, until the decision in 2 Saund. 175, note 2. As that decision was since the American Revolution, after which the English courts ceased to have authority here, and is an anomaly in the law, the modern doctrine founded upon it has not been received as suitable to the condition of this country; 19 Wend. 309; 2 Watts, 331.’ It is clear from this extensively cited authority that the English rule of new adoption comparatively does not prevail in Pennsylvania. Following this case, LOWRIE, C. J., says in *Haverstick v. Sipe*, 9 Casey, 370, ‘It has never been considered in this State that a contract for the privilege of light and air, over another man’s ground, could be implied from the fact that such a privilege has been long enjoyed, or that on a sale of a house and lot such a contract would be implied, from

the fact that such a privilege has been long enjoyed ; or that on a sale of a house and lot such a contract could be implied from the character of the improvements on the lots sold and the adjoining lots.'

"There is therefore no rule of the English courts which is final and conclusive in Pennsylvania. The case is to be adjudged therefore either upon general principles, applicable to our civilization and in accordance with general public policy, or to be determined by the light cast by the decisions of our sister Commonwealths.

"To adjudicate the question fairly, the proposition to be adjudged must be distinctly stated and clearly understood.

"It is clear that Mr. Rozell, the defendant, is the owner of the servient tenement. The plaintiff purchased with his house and windows overlooking the lot of the defendant. The latter built, closing the windows of the former, and the question presented is, whether a servient tenement can close the windows on one side, and thus deprive the dominant tenant of the light and air which he desires from that side. I think I have stated the question fairly. It is new in Pennsylvania, and it is entitled to a broad ruling. The law should be clear on so important a topic and this court will endeavor to rule so explicitly that all doubt will be at an end when its conclusion is affirmed or denied by the court of last resort.

"The inquiry is by no means free from difficulty. This question has never been distinctly met and ruled in Pennsylvania ; and in other States the rulings are conflicting. *Haverstick v. Sipe, supra*, is the case of a dominant tenant, and while in dictum it is decisive, is upon the question involved by this record no more than a dictum. Though largely cited, it does not definitely rule, as contended, or as quoted. One case has been ruled in Pennsylvania by FINLETTER, J., *Kay v. Stallman*, 2 W. N. C. 643. This stands alone, and is, I have no doubt, well ruled under the special facts of the case, which when understood, demonstrate that the dominant tenement would have lost its light and air, and also its means of access, if the erection upon the servient tenement had been maintained. This case therefore involves the question of necessity — an element which the master here has found is not involved by this record.

"In other States two cases stand prominently forward. They conflict as to their conclusions ; are to a great extent irreconcilable upon general principles, and are pressed upon the court by the able contending counsel, who have made this case a specialty ; and who

by their intellectual exertion have awakened a vivid interest in the court. It cannot be denied that *Story v. Odin*, 12 Mass. 157, rules the point at issue, so far as the opinion of the court is concerned, squarely ; for it does declare that the owner of a servient tenement may not interfere with the light and air of the owner of the dominant tenement. This clearly is the force and scope of the opinion, though the special facts of the case would have sustained the judgment on the ground of necessity. If it stood alone I should be governed by it, notwithstanding the wise dictum of *Haverstick v. Sipe*, *supra*, and the modifying influences of *Kieffer v. Imhoff*, 2 Casey, 445 ; 6 id. 293 to 299, as well as of Washburn on Easements, 589, 590, and authorities there cited. A careful examination of *Maynard v. Escher*, 5 Harris, 226 (a case miscited through error in the syllabus), 6 Casey, *supra*, of 14 Wright, 423, and the authorities cited by AGNEW, J., will demonstrate that the broad ruling of *Odin v. Story*, *supra*, has not been adopted in Pennsylvania. Still as has been said, a respectful regard for the Supreme Court of Massachusetts would induce me to follow its ruling were there no other adjudicated cases. But the same tribunal, at a much later period, in *Keats v. Hugo*, 115 Mass. 208, adopts a different rule, and one which accords with my own views of this question, as affected by public policy and business interests. I understand this case to overrule *Story v. Odin*, or at least, to explain it to such an extent that its rights as a precedent fall. *Story v. Odin*, was ruled in 1815 by JACKSON, J., and it will be noticed that it is based upon English authorities, and that its reasoning is therefore weakened in Pennsylvania by what is said by our Supreme Court in *Wheatley v. Baugh*, *supra*.

“ *Keats v. Hugo* was ruled in June 1874, and beginning with *Story v. Odin* reviews in analytical detail all the cases adjudicated in Massachusetts, and some other States, upon this question. This case rules that the easement of light and air is not implied from the grant of a house having windows overlooking land retained by the grantor. It declares that since *Story v. Odin* and the *obiter dicta* in 12 Mass. 220; 17 id. 443; 1 Sumn. 492, the cases have been more fully considered on principle, and that the tendency of judicial decisions in Massachusetts and most other States has been to deny the doctrine of acquiring a right to light and air by presumption or implication. Chief Justice GRAY adds: ‘ In no judgment of this court, since *Odin v. Story*, has any right of light or air been upheld

except by express grant or agreement. In this most learned and exhaustive opinion, the learned judge first notes that *Odin v. Story* is based upon English authorities; that neither in the opinion of the court, nor in the argument of counsel is it suggested that a different rule may be required by the exigencies of a new country, with new wants, under a new and developing system of civilization and improvement; and that the facts of the case themselves did not require a decision upon the general principle. He then reviews the authorities at great length. Among these is *Collier v. Pierce*, 7 Gray, 18, which has the authority of Chief Justice SHAW to uphold it. I will not pause to cite the other authorities quoted in the opinion. Many of them are used to show the tendency of the courts to hold, in this country, that easements of light, air, overhanging projections, are not implied in favor of the dominant as against the servient tenement. The principal case is strong, clear and most emphatic, and its concluding reasoning is so sound that I cannot forbear quoting it *in extenso*: 'By nature, air and light do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land is created not by the relative situation of the lot to the surrounding lands, but by the manner in which that lot has been built upon. The actual enjoyment of the light and air by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor indeed any use of them which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining land has submitted to nothing which actually encroached upon his rights, and cannot therefore be presumed to have assented to any such encroachment. The use and enjoyment of the adjoining lands are no more subordinate to those of the house where both are owned by one man, than where the owners are different. The reasons upon which it has been held that no grant of a right to light and air can be implied from any length of continuous enjoyment, are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the right of such a grant in either case, without express words, would greatly embarrass the improvement of estates, and by reason of the very indefinite

character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and use of lands, is, that no right of this character shall be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed.' * * * 'Considering therefore that by the preponderance of reason and authority no grant of any right of light and air over adjoining lands is to be implied from the conveyance of a house, we have only to apply this rule to the facts.' In 1876, *Doyle v. Lord*, 64 N. Y. 432; s. c., 21 Am. Rep. 629, per EARL, J., this doctrine, there styled the 'American doctrine,' as to light and air, is distinctly recognized, the learned judge citing *Keats v. Hugo*, *supra*; *Parker v. Fools*, 19 Wend. 315; 2 Sand. 316; *Myers v. Gemmel*, 10 Barb. 537; *Mullen v. Stricker*, 19 Ohio St. 135; s. c., 2 Am. Rep. 379; *Haverstick v. Sipe*, 9 Casey, 368.

"(*Doyle v. Lord*, *supra*, it may be parenthetically remarked, involves the distinction which seems to sustain the ruling in *Kay v. Stallman*, 2 W. N. C. 643, by FINLETTER, J.)

"In *Turner v. Thompson*, 58 Ga. 268; s. c., 24 Am. Rep. 497, it was ruled, that where land was sold with a house on it, having windows overlooking the adjacent land of the grantor, the latter was not estopped from obstructing the windows, unless they were necessary to give light and air to the house; or if sufficient light and air could be derived from other windows open, or that might be commonly opened elsewhere in the house. This case was evidently most carefully considered; it reviews the earlier Massachusetts and New York decisions, adopts *Keats v. Hugo*, and the reasoning of Chief Justice GRAY, and of *Mitchell v. City of Rome*, 49 Ga. 19; s. c., 15 Am. Rep. 669. It is worthy of remark however that this case limits the general application of *Keats v. Hugo* as between dominant and servient tenement in one important respect. I think the limitation is wise and right. It is, that an implied easement of light and air will be sustained in case of real necessity. *Powell v. Sims*, 5 W. Va. 1; s. c., 13 Am. Rep. 629. Many more cases might be cited, and I have examined every case on the briefs of counsel, save one from Lord RAYMOND; but enough has been done to justify the conclusions of law which I am about to reach, and which, I think, should become the law of Pennsylvania.

"1. No implication of a grant of the right to light and air arises upon a sale of one of two adjacent lots having a house upon it, with windows overlooking the land of the grantor.

"2. The grantor, by such sale, is not estopped from improving his retained lot by building upon it, though his erection darkens the windows of his vendee, and excludes the access of light and air from such windows.

"3. That the limitation of these two propositions depends upon the fact as to whether such windows are a real necessity for the enjoyment of the grantee's property. If they be, then the implication of the grant of an easement of light and air will be sustained; if they be not, or can be substituted at a reasonable cost, with a view to the purposes of the dominant tenement, then such implication will be denied and rejected.

"4. The American doctrine as to light and air requires an express grant or agreement, unless a real and actual necessity exists, to vest a dominant tenement with such right.

"5. The doctrine of ancient lights is not recognized in Pennsylvania.

"These principles being determined, and there being no express grant or agreement disclosed in the facts reported by the master, but one question of fact arises upon the case as presented by the master.

"Are the windows, closed by the defendant's erection upon his own lot, a real and actual necessity for the purpose of furnishing the necessary light and air to the house of the plaintiff? The master has found they were not, and when it is remembered that the house of the plaintiff is at a corner of a street in an incorporated borough, it is hard to conceive how the master could reach a different conclusion, particularly in the light of the testimony of the witnesses.

"One other inquiry remains. Mr. Widdecombe, a former owner of the premises, declares that he bought the lot now owned by the defendant for two purposes, one of which was to obtain more light and ventilation, and that he sold the two lots together to Mr. Wotton as a whole. I cannot see how this can affect the case. The purposes for which a former owner purchased property cannot affect the use and rights of his vendees or alienees, unless such purposes are covenanted for, are actually or constructively known to such alienees, and are in the nature of contracts or covenants

which may be enforced between themselves or by others. The deed in fee bars the grantor, and a mere purpose on his part will not control his alienors. Mr. Widdecombe could have changed his purpose and built upon the lot while he was the owner of both; his vendee, unrestricted by covenant, may do the same. The bill cannot be sustained on this ground. The master has elaborated the other questions with sufficient clearness, and all the exceptions to his report are overruled.

"In conclusion, it seems proper to add one word. The motion for a preliminary injunction was refused after brief hearing; and though I then formed a clear idea of what the 'American doctrine' ought to be, no time was given, nor argument made to and upon that hearing, which involved the exhaustive research displayed by counsel in the final argument.

"I have carefully and patiently considered all the cases cited, and tested the clear and forcible reasoning of counsel by the authorities now within my reach, and have endeavored — I believe successfully — to hear the case *de novo*. But were there no authorities, I am clearly of opinion that the law should be as I have found it. Public policy requires that in a new and developing country the spirit of improvements of betterments should not be chained and handicapped by the law. With the limitation of an implication arising from real and actual necessity, the time-honored and equitable maxim of *sic utere tuo ut non alienum laedas* is carefully observed. If the principles of *Story v. Odin* were to prevail, one with a series of town lots would, after the sale of one, imply a grant as to two others immediately adjoining that would destroy them for building purposes, and a one-story house would be compelled to remain one story because its dominant tenement had two. All improvement would be stayed, values would be destroyed, and alienations, except under special contracts, rendered dangerous for the future and ruinous in the past.

"Our court of last resort, in *Bentz v. Armstrong*, 8 W. & S. 40, approved in *Young v. Leedom*, 17 P. F. Smith, 351, indicated that the agricultural rule of drainage as between servient and dominant tenements cannot apply in boroughs and incorporated towns. The reason is that no lot could be filled up and graded, or be adapted to building purposes, if such rules prevailed in towns. If that conclusion be sound within the scope of the maxim, *sic utere tuo, etc.*, surely the same spirit of public policy would protect lot-

holders in boroughs, towns and villages of light and air, even though a different rule for agricultural lands. But I think this opinion is applicable to Pennsylvania and New Jersey, a different rule for New Jersey.

Charles Hunsicker and E. Coppee

B. M. Boyer, for appellee.

Per CURIAM. The learned presiding justice has fully and exhaustively discussed the question involved in this appeal, and it is unnecessary for us to do so. We affirm this decree upon the merits. Decree affirmed and appeal dismissed.

PENNSYLVANIA COAL CO.

(94 Penn. St.)

Water and water-course — nuisance

A coal mining company fouled a natural water-course by discharging water from its mines into it, to the damage of the plaintiff. The act could not be justified either by the general custom or by any local custom.

TRESPASS on the case. The facts are stated in 27 Am. Rep. 711. The plaintiff is

A. T. McClintock, I. J. Post and others vs. *A. Ricketts*, for defendants in error.

A. Ricketts, for defendants in error.

GORDON, J. The material point in this case has been fully and carefully discussed in the opinion of my lamented brother WOODWARD, in the case of *Post v. Ricketts*, and which may be found in 86 Penn. St. 711. As that opinion has been followed in this case, we are relieved of any extended discussion now presented. Whether or not the

from the act of the defendant in pumping deleterious mine water into the Meadow brook was fairly submitted to the jury, and that body found that that was the immediate cause of the injury. When, in 1868, Mrs. Sanderson purchased her property on Meadow brook, she found the water of this stream pure and valuable for domestic purposes. Her right to have and use these waters, as she found them, is undoubted. This right, though of an incorporeal character, was as absolute as her right to the land through which they flowed. But that right has been destroyed, or its value seriously impaired by the direct act of the defendant. As then it has been the cause of the injury, why should it not be held to an account therefor? The answer is twofold: 1st. It is said, the pollution of this brook results from the necessities of coal mining, and as that is an industry important to the welfare of this Commonwealth, the right of the plaintiff must yield to it. But this argument is fallacious in this: the mining operations of the defendant do not involve the public welfare, but are conducted purely for the purposes of private gain. Incidentally, all lawful industries result in the general good; they are however not the less instituted and conducted for private gain, and are used and enjoyed as private rights over which the public has no control. It follows, that none of them, however important, can justly claim the right to take and use the property of the citizen without compensation.

2d. It is urged, that the customary mode of disposing of water pumped from mines, in the Lackawanna and Wyoming coal regions, has been to allow it to flow into the adjacent natural water-courses. Of this proof was offered, and that for the purpose of showing a general custom thus to use the rivers, creeks and smaller streams of this part of the State, and it may be added, so to destroy the rights of riparian owners. As a local custom, or prescription, this has no application to the case in hand, for the colliery of the defendants appears to be the only one within the territory drained by Meadow brook, and the pollution of its waters has occurred since the plaintiff's purchase. As a general custom it lacks the necessary age, for the beginning of deep coal mining, in the regions above named, is quite within the memory of men yet living. Wanting this, it fails in a particular essential to the establishment of such a custom. *Jones v. Wagner*, 16 P. F. Smith, 429. But more fatal still to the defendants' pretension is the fact that the effort is thus to justify the disturbance of private property for the advancement of the pri-

Philadelphia and Reading Rail

vate interest of the defendant corp
 plea of an ancient customary use, r
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 be sustained.

PAXSON and STERRETT, JJ., disse

PHILADELPHIA AND READING R.

(94 Penn. St.

Carrier — negligence — insufficient r

Where a passenger by railway is injured by
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 way.

Philadelphia and Reading Railroad Company v. Anderson.

Where a passenger by railway is injured by an accident caused by the washing away of the embankment, the carrier is not relieved from liability, although the embankment was constructed by a competent engineer, and the washing away was the result of an unprecedented storm, provided the provision for drainage at the point in question was defective.*

TRESPASS for personal injuries by negligence. The head note and opinion sufficiently show the facts. The plaintiff had judgment below.

James E. Gowen, H. M. North, and James Boyd, for plaintiff in error.

John H. Brinton, William Aug. Atlee, Charles H. Pennypacker, and B. F. McAtee, for defendant in error.

GORDON, J. As those rulings of the court below which put the burden of proof upon the defendant, plaintiff in error, have been treated in the argument in this court as of primary importance, we will first examine and dispose of the exceptions to them. These exceptions are numbered, respectively, 14, 15, 16, and 17, and the rulings of which they complain may be summed up as follows: that where for a consideration a railroad company undertakes to transport a passenger from one point of its line to another, there arises an implied contract upon part of the company, that it has for that purpose provided a safe and sufficient road, and that its cars are sound and roadworthy; that where the passenger is injured by any accident arising from a collision or defect in machinery, he is required, in the first place, to prove no more than the fact of the accident and the extent of his injury; that a *prima facie* case is thus made out, and the *onus* is cast upon the carrier to disprove negligence; that in the case trying, the legal presumption was that the injuries to the plaintiff were caused by the negligence of the defendant, and that this presumption continued until a counter-vailing presumption of fact was established. To this the learned judge added, that this *prima facie* presumption might be overthrown by proof, to the satisfaction of the jury, that the injury complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide. Now we must say, the able argument of the learned counsel to the contrary notwithstanding, that a better summary of the law govern-

* See *Railroad Co. v. Halloren* (53 Tex. 46), 37 Am. Rep. 744, and note, 749.]

ing cases of this kind could scarcely be deemed almost a transcript of the ruling. Mr. Justice WOODWARD, in *Sullivan*. The case referred to being in point, part of the present contention, unless books which teach a contrary doctrine, so, the very contrary is the fact. Mr. Justice BELL says, when speaking of passenger carriers: "But though in law it warrants the absolute safety of passengers, the exercise of the utmost diligence against which human prudence and which hurt or loss is occasioned, will in damages. Nay, the mere happening raises *prima facie* a presumption of negligence on the part of the carrier the *onus* of showing it did not exercise attention to the safety of the passengers is strong and sufficient for the journey, in every respect sea, road, steady horses, or other means of propulsion, conductors and other agents, whose duty is to guard against danger." This language is to the point, and *Sullivan v. R.* is authority for it. Both these cases are cited by *Smith v. Railroad Co.*, 14 P. F. Smith, 22 where their language is reiterated. Furthermore, *Lackawanna & Western Railroad v. Smith*, 135, Mr. Justice STERRETT makes "If a passenger seated in a railroad car is injured by the overthrow of a car, the breach of the duty of the carrier, as to the part of the machinery, he is not required to prove the fact, but the fact of the injury. A *prima facie* case is made out, and the *onus* is cast upon the carrier to show that the injury was not caused by the negligence of the carrier. This is thus manifest, that the rulings of the court below on this point are abundantly supported by authority, and that the exceptions taken are without merit."

In immediate connection with the above, the court to affirm the defendant's verdict. That point required the instruction

had been constructed under the supervision of a competent engineer, and that the drainage, at the place where the accident happened, was provided for in a manner directed and approved by him, that subsequently the road was leased to the defendant, and that the embankment was washed out by a storm of unusual violence, the defendant was not liable for any error of judgment of the engineer, even if such error occasioned the accident. This point, curiously enough, draws upon the doctrine of inevitable accident to help out a principle of law, sufficiently strong, in a proper case for its application, to stand alone. It is a principle, the latest enunciation of which is found in the case of the *Mansfield Coal & Coke Co. v. McEnery*, 10 Norris, 185; s. c., 36 Am. Rep. 662, in which it was held to be a sufficient answer to an action brought by an employee, for an injury resulting from the falling of a bridge of the company by which he was employed, that such bridge had been built by a competent builder. But this doctrine can have no application to the case in hand, and for the very good reason that a passenger is not an employee. The one by his contract is presumed to run the ordinary risks of the machinery and appliances he is engaged to supervise or use; he is also held to a knowledge of the character and obvious defects of such machinery and appliances, as well as the skill and habits of his co-servants. A passenger on the other hand neither can know, nor is presumed to know any thing about these things. He has paid for his passage, and he is wholly passive in the hands and at the mercy of the transportation company and its agents. The doctrine advocated by the defendant's counsel, by which the passenger would be put on a par with an employee, will not do it; it accords neither with reason nor precedent. The cases of *Grove v. Chester and Hollyhead Railroad Co.*, 2 Ex. 251, and *Francis v. Cockrell*, L. R., 5 Q. B. 184, are full in point. In the former the action was by a passenger against a railroad company for damages resulting from the breaking down of a bridge whilst the train was passing over it, and it was held, that whilst it was a question for the jury, whether the defendant had engaged competent engineers who had adopted the best method and used the best materials in the construction of the bridge, yet the mere fact of its having engaged such persons would not relieve it from the consequences of an accident arising from a deficiency in the work. In the latter the action was for damages resulting to the plaintiff from the breaking down of a grand stand, erected for the viewing of

Philadelphia and Reading Railroad

certain races, and which had been built and leased to the defendant, he, the defendant, was entitled to compensation from the plaintiff for admission of the plaintiff could sustain an action for the damage thus sustained, although the defendant was free from all negligence, and had erected the stand.

In view of these authorities we have held that the point was properly refused, and that the defendant was to the jury that the mere fact of the defendant's road did not release it from the contract, and that it was bound to see that its road was safe and sufficient between the plaintiff's ticket.

The defendant's counsel however argued that these rules do not apply to the case in which this was occasioned by a condition of the contract which neither foresee nor provide against; that the fact of the great rain storm which occurred was unprecedented in the history of the country, and that in defiance all human skill and prudence was required at that point in controversy, and the learned judge, after the facts were as above stated, they held for the defendant. But he also told them that if the injury was the want of a proper construction of the fact of the storm would not of itself constitute this we think he was correct. The contract on part of the plaintiff were of the contract that it was not properly drained, that the defendant's road was faulty, and that had there been proper dimensions, the rain-fall, great as it was, would have made a serious impression upon it. It is true that the defendant was induced upon part of the defendant we held for the defendant, the jury believed the former rather than the latter a perfect right to do, and so the matter was remanded to the court or the court below is concerned.

[Omitting minor points.]



AKERS V. HITE.

(94 Penn. St. 394.)

Insurance — cancellation — mutual company.

An insurance by a mutual company may be cancelled by agreement of the parties, and the insured is not liable to assessment on his premium notes for subsequently contracted indebtedness.

DEBT by the receiver of an insolvent mutual insurance company on premium notes. The opinion shows the facts. The defendants had judgment below.

Frederick Jackel and J. M. Reynolds, for plaintiff in error.

John Cessna, Alexander King and J. B. Cessna, for defendants in error.

TRUNKEY, J. The business of an insurance company, whether conducted on the mutual or stock plan, is managed by its officers and agents, and the corporators are bound by the acts of such agents in all matters properly done within the scope of the powers committed to them. A policy of insurance and the premium note given therefor constitute a contract between the company and the insured, and the parties usually have the same power to rescind it by mutual agreement as they had to make it. Such a power on the part of the company seems essentially necessary to the safe and proper transaction of its business. *Roland v. Whitman*, 33 Ind. 64; *Woodwarth v. Davis*, 13 Ohio St. 123. Most mutual companies insert stipulations in their policies that they shall become void, either *ipso facto* or at the option of the company, for certain acts of omission or commission by the insured, and when avoided, the rights and liabilities of the member are ended, except his liability for debts already incurred. *Columbia Ins. Co. v. Masonheimer*, 26 P. F. Smith, 138; *Wilson v. Trumbull Ins. Co.*, 7 Harris, 372. The right of the company to cancel policies and thus terminate the contract for various acts of the insured, though such right be not expressly reserved, has constantly been recognized, and it would be strange if it could not agree with the insured to abrogate the contract when deemed expedient or advantageous.

It is contended by plaintiff that it is the duty of the directors of a mutual insurance company to protect and relieve the insured from the obligation of the policy, and the latter has paid his full proportion of the surrender. Citing *Maine v. Me. 130*. In that case the note was given by the directors of the charter of the company, for security, and is not like the case of a note given in consideration. Thus, when the assured received from the secretary of the company a note for being contested claims which were surrendered, which he paid nothing, and afterward made an assessment on the said assured, it was held that the matter had been settled between the directors and the assured, and the receiver could not set aside the lawful acts of the corporation. *See* *After the filing of a petition by a member before publication of the appointment of a receiver, the premium note paid an assessment on the policy, under an agreement with an insurance company that such payment and surrender of the note which was agreed to be given up, be extinguished and the receiver could not set aside the same.* *Sands v. Hill*, 55 N. Y. 18. A good rule is that parties in a contract of insurance, to

Every person insured in the Union Mutual Insurance Company of Blair county became a member of the company, and subject to the liabilities of the company. The property insured was the amount of the policy, and was liable to assessment for payment of the policy at the time of his membership. When a member, he would not be liable for the policy, but would be assessed for payment of debts of the company unless he had duly settled with the company. The charter provides that all affairs of the company be managed and controlled by a board of directors, and that the directors pursue the resolutions of the board, and pay just dues, as assessed against them, and that the directors return to the company the amount of the policy.

Owen v. Western Savings Bank.

were so returned, and said board promised to cancel them and return the stock notes as soon as the secretary had time; that the assessment laid by the directors, being the just dues so paid by defendants, was insufficient to pay the liabilities then existing; that said policies were not in fact cancelled, and said notes came into the hands of the receiver who laid the assessments in suit; and that under said resolutions the directors cancelled the principal part of the capital stock.

It is plain that the parties agreed to rescind the contract of insurance, and accordingly the defendants paid their money and surrendered their policies. They were bound by this agreement as if the policies had been marked cancelled and the notes given up. From thence the defendants had no insurance, they were not members, nor were they liable on the notes. The plaintiff has no more right to collect assessments on these notes than on those which had been actually returned on like terms. This case must be disposed of on the facts in the verdict, not outside. Whether there are facts which would make all, who were once members, liable to assessment for indebtedness created before the cancellation of their contracts, does not appear — they are not in the verdict. For aught that is found the directors acted in good faith, and did what they deemed for the interest of the company. It would be as just to assess the large number who got back their notes as the few to whom the secretary neglected to return their notes, as the directors promised he should do.

Judgment affirmed.

OWEN V. WESTERN SAVINGS BANK.

(97 Penn. St. 47.)

Limitation — statute of — action against recorder for false certificate.

A cause of action against a recorder of deeds, for damages by reason of a false certificate of search, accrues when the claimant parted with his money on the faith of it.

ACTION of damages for false certificate of search by a recorder of deeds. Defense, statute of limitations. The plaintiff did not discover the falsity of the search until more than six years after it was given. The plaintiff had judgment below.

George Northrop, for plaintiff in error

Wm. Henry Ruwe, for defendant in error

GORDON, J. This case may be certain mere attention to and following of the 27, 1713, which prescribes, *inter alia*, 'and upon the case shall be commenced next after the cause of such actions and action now in hand is "upon the case against the defendant for the recovery resulted from a false certificate of search order of deeds of the county of Philadelphia

As fraud is not charged against the complicated by that element, and the negligence alone. Under the statute then the cause of action and when did it arise? the issuing the false certificate, and the the plaintiff just as soon as it parted with it, and as a consequence, from that period. But answers the counsel for the plaintiff was at that time any special damage. The damage is a result, not a cause, and as 5 B. & C. 259, the gist of the action by the defendant, omitting wholly the allegation of the plaintiff would nevertheless be entitled to recover. In this same case it was held that special damages for a breach of duty, do not constitute a fresh ground for the measure of the injury resulting from the breach. This doctrine was held in *Wilcox v. Plumme* was an action for a loss resulting from the neglect of an attorney; also in the *Bank of England v. Adams*, 16 Mass. 456, where the suit was for a breach of official duty in making an original writ. In our own court we have decided by our brother, Mr. Justice STERRETT, in *Moore v. Juvenal*, 11 Norris, 484, which covers damages arising from the negligence in cutting a claim. To the same purpose

Germantown Passenger Railway Company.

Boggs, 12 Wright, 524; *Downing v. Gerrard* and *Miller v. Wilson*, 12 Harris, 52, 114. All these authorities, and many more which might be cited, only serve to illustrate that which the statute of itself makes plain enough — namely, that the commencement of the limitation is contemporaneous with the origin of the cause of action.

And we see also from the cases cited, that the distinction which the counsel for the plaintiff has attempted to draw between torts arising from contracts and those which arise from official misfeasance, cannot be sustained. Such a distinction is not found in the statute, and it is clearly opposed to reason; for why should a duty imposed by the legislature be obligatory rather than one which is voluntarily assumed? Nay, a man might the rather be excused from the performance of an obligation forced upon him, than from one which of his own will he took upon himself. Indeed, the two become equal and all distinction disappears, only when we consider that the statutory duty is assumed as part of the office which the incumbent undertakes to fulfill. Moreover the officer having thus assumed the duty and being paid therefor by the party who requires its performance, the transaction to all intents and purposes becomes a personal contract, as much so as though it were wholly voluntary and not statutory.

The judgment of the court below is now reversed and set aside, and it is ordered that judgment be entered on the case stated for the defendant, with costs.

Judgment reversed, with costs.

GERMANTOWN PASSENGER RAILWAY COMPANY.

(97 Penn. St. 55.)

Negligence — contributory — riding on front platform of car.

It is not conclusively negligent for a passenger on a crowded street car to stand on the front platform, with the assent of the conductor or driver.

SUFFICIENTLY reported, 37 Am. Rep. 711.

LANIGAN V.

(97 Penn. St. 1)

Landlord and tenant — eviction

The owner of ore lands, in consideration of a lease for fifteen years, the lessee covenanting to remove all buildings and machinery which he had erected upon the demised premises, and the lessor covenanting that at the expiration of the term of the lease he would remove all buildings and machinery which he had erected upon the demised premises, and the lessor, *held*, that only nominal damages were recoverable.

COVENANT. The head note and the facts of the case were stated by the plaintiff had judgment for \$6 b

S. E. Cavin, F. Carroll Brewster and the defendant in error.

A. Sidney Biddle and George W. .

PAXSON, J. This was an action by the lessee of certain ore lands in Cumberland County, Pa., to recover damages for an eviction from the premises. The lease was for the term of fifteen years, and at the expiration of the term the lessee was evicted under a paramount title.

It is settled by abundant authority that a lease implies a covenant for quiet enjoyment. It is sufficient to refer to *Hempstead v. Maule*, 8 Harris, 482; *Scranton and Railroad Company v. Schenck*, 4 Rep. 80 b; *Line v. Stephens*, 100 Pa. 263; *Rawle's Cov. f*

So much is conceded. Nor is it denied that a covenant implied from the use of the premises can be maintained. The only contention is as to the amount of damages. The plaintiff offered to prove (by his first specification), the value of the buildings erected upon the demised premises, and the damages which he had sustained by

court below ruled out the offer, and instructed the jury to find nominal damages only.

The eviction here, as before stated, was by a paramount title. It is not the case of an eviction by a landlord in disaffirmance of his own act, or by a fraud perpetrated upon the tenant. It is important to bear this distinction in mind, as the measure of damages is different in the two classes of cases.

It may be conceded to be settled law in England that the measure of damages for the breach of an express covenant for quiet enjoyment is the value of the property at the time of the eviction; *Williams v. Burrell*, 50 E. C. L. R. 401; *Lock v. Furze*, 115 id. 94; *Rolph v. Crouch*, L. R., 3 Exch. 44. These cases hold that the rule in *Flureau v. Thornhill*, 2 W. Bl. 1078, that where a contract of sale of real estate goes off in consequence of a defect in the vendor's title, the vendee is not entitled to damages for the loss of the bargain, does not apply to the case of a lease granted by one who has no title to grant it.

In this State it is settled that as between vendor and vendee the measure of damages is the consideration paid. *Bender v. Fromberger*, 4 Dallas, 441, which expressly ruled the point, has never been questioned, but on the contrary, has been followed in a number of later cases, which it is needless to cite. While the contrary doctrine has been asserted in a few of the States, the principle of *Bender v. Fromberger* has been recognized in a large majority of them, and by the Supreme Court of the United States. The cases will be found collected by Mr. Rawle in his *Covenants for Title*, p. 235.

The question which immediately concerns us is whether the same rule applies as between lessor and lessee. In England, as we have seen, it does not, and the measure of damages is the value of the property at the time of the eviction. Upon this point the authorities are meager, and by no means uniform. The true rule however would appear to be, that in an action by a lessee against his lessor for an eviction by a paramount title, the measure of damages is the consideration paid, and such mesne profits as he has paid or may be liable for. The consideration for a lease is usually the rent reserved. If the tenant has enjoyed the possession of the demised premises, he has had the precise equivalent for the rent; if he has paid the rent in advance, he is entitled to recover it back in the form of damages for the eviction. This is substantially the rule laid down

in *Mack v. Patchin*, 42 N. Y. 167 ; s
was said by EARL, C. J.: "In an ac
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ordinarily recover only such rent as he
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analogous to those applied in the sale
v. Patchin came within the exception
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lessee leased the premises under a similar belief; both were mistaken. The lessor loses what he paid for the property, unless he is protected by apt covenants in his title, and is liable to his lessee to the extent of the consideration paid by the latter. Is he liable beyond this? The lessee contends, that he is also responsible for the improvements made by said lessee upon the property.

The liability of a lessor under the implied covenant for quiet enjoyment, for improvements made upon the demised premises by the lessee, may depend upon circumstances. A tenant who upon his own motion, and for his own purposes, erects a building or other improvement upon a leasehold, certainly cannot recover the value thereof from the lessor in event of an eviction. In such case, the rule of *caveat emptor* would apply: It was his own folly to build upon another's land. It was contended that the case in hand does not come within such rule however, for the reason that the lessee covenanted with the lessor to erect the improvements in question. The lease does contain such a covenant, as to a portion of the improvements. It provides, that the lessee shall "forthwith procure and set up good and approved machinery, to take out and work said ore," and the lessor "covenants and agrees, to and with the said lessee, that he shall have the full privilege of building houses and erecting all necessary machinery for developing, working and taking out the ore upon the said tract; and that at the expiration of the hereby demised term, or in case the ore shall not be found in the sufficient quantity upon said tract, he shall have the right to take down and remove all buildings and machinery so put up or erected."

So far as the improvements which were put up by permission merely of the lessor are concerned there can be no question. There was no obligation to put them up, and there can be no recovery. But it is said that as to the machinery, there was a covenant to erect it, and therefore the lessee may recover its value in this proceeding. It will be observed that in no event was it to become the property of the lessor. The lessee was expressly authorized to remove it at the close of his term, or sooner if ore shall not be found in sufficient quantity upon the tract. We are therefore unembarrassed with the question that would arise had the covenant required the improvements to be left upon the premises at the expiration of the term. The improvements were primarily for the use and benefit of the lessee in his business. He leased the premises for the purpose

of mining iron ore. This necessary machinery and appliances usual in such the tenant could not possibly have covenanted to pay. The lessee having the covenant to erect the necessary its strength, for the reason that such incident of such mining. He might put on the mules, carts, picks and tools. The lessor had neither title nor interest could not be said to have derived advantage, as it enabled the lessee to can be said is that it increased the lessee's payment of the rent upon the days as been so far an answer to a suit by the breach of the covenant of the latter nominal damages only could have machinery was the property of the lessor convenience in the prosecution of his have been a part of the consideration more than the ordinary case of land. The latter for his own convenience, and building or puts up machinery for the case, the lessor has increased security amount that property of this description.

There was evidently a mutual mistake. Why should the lessee throw the burden wholly upon the lessor? He was not the latter. He probably examined the title might have done so, and the omission might be negligence under the circumstances. Doubtless is true that in ordinary cases title is neither usual nor necessary regard to leases of valuable ore-land and when from the necessities of the case are required. The lessee of a small tract need not concern himself about the title. In such cases and that is the end of it. But in the case we are considering, title is of such importance that one but a very careless man would neglect a careful examination. However careful

ordinary leases, it is well to understand that when a lessee seeks to improve demised premises, the rule of *caveat emptor* applies, and he would do well to see that his lessor has title. And if not satisfied therewith, he may further protect himself by apt words in an express covenant.

There is no case in this State which is in conflict with this view. *Hemphill v. Eckfeldt*, 5 Whart. 274, is not in point. The question of the measure of damages in an implied covenant for quiet enjoyment was not before the court. In *Maule v. Ashmead*, 8 Harris, 482, the eviction was not by title paramount, but by the act of the lessor, and comes within the exceptions noted in *Mack v. Patchin*, *supra*. In *Schuylkill and Dauphin Railroad Co. v. Schmoele*, 7 P. F. Smith, 271, the measure of damages was not even adverted to. *Kille v. Ege*, 1 Norris, 102, was an action for mesne profits, and raised no such question as the one we are considering. *McClowry v. Croghan's Admr's*, 1 Grant, 307, is an authority the other way. That was an action to recover damages for the breach of a contract to renew a lease, and it was held the plaintiff could not recover for the loss of his bargain; that the value of the contract was not the measure of damages for its breach.

We are of opinion the court below committed no error in excluding the offer to show the value of the improvements referred to in the first specification.

[Omitting a minor question.]

Judgment affirmed.

HORSTMAN V. KAUFMAN.

(97 Penn. St. 147.)

Constitutional law — compelling one to give testimony against himself.

A statute provided for the compulsory examination by a judgment creditor, of his debtor, on oath, as to property which the creditor alleged he had fraudulently concealed, such fraudulent concealment being a criminal misdemeanor, and the statute not providing against the use of the testimony on a prosecution for such misdemeanor. *Held*, unconstitutional.

CERTIORARI proceeding for the appointment of a commissioner to take the compulsory examination of a judgment debtor on oath after execution returned unsatisfied. The head note and opinion show the facts. The motion was denied below.

Isaac S. Sharp, for appellant.

Mayer Salzberger, for appellee.

GORDON, J. In *Sharpless v. Zie* that under the act of 17th of March, 1869, allowed in general terms the wording of a writ to the prothonotary to issue, and that the court had no power to refuse, on proper cause shown, to issue it affected the goods of the debtor seized in execution. Attention to the obvious distinction in the act of July 13, 1842, in that writ by the latter can be issued only after a writ authorized by the former issues ministerial act.

The act under consideration, Jurisdiction would seem in this respect to be of 1869. All that is required of the court is to subscribe an affidavit it shall appoint a commissioner. Indeed even this may be done by the standing commissioner, for the act does not require to be appointed specially for the case in question.

Whilst therefore the correctness of the act is admitted, we cannot agree with the court in its holding of the validity of the act, the affidavit was insufficient to appoint a commissioner. The act gives to the statute, which is all that seems to be required, as judicial discretion is left to the discretion of the creditor. The plaintiff in the case is the sole, unrestrained, and unlimited owner of the property and his commissioner the defendant was to go there and there at his own good pleasure without rule, restraint or supervision of time or manner. What questions shall be asked, what books and papers shall be examined, how long the unfettered power shall be exercised, and when discharged, of all these questions the judge, and the Court of Common Pleas, may force his behests by subpoenas and at

With all this power the execution plaintiff clothes himself by the mere act of filing an affidavit "that he has reason to believe that said judgment debtor has property, rights in action, stocks, moneys or evidences of debt, which he fraudulently conceals and refuses to apply to the payment of his debts." And when he is so clad with this power, whether he will use it discreetly and properly, or arbitrarily and improperly, rests altogether with himself. A more ingenious, inquisitorial device to squeeze the last farthing from the wretched debtor was never before devised, and for its complete perfection it needs but the boot and thumbscrew.

Dropping however the question whether the legislature can constitutionally invest one citizen with a power so arbitrary and so irresponsible as that found in this statute over a fellow-citizen, and whether a court may be so far disrobed of its judicial functions as to be made the mere tool of the creditor, there are nevertheless some rights possessed by the debtor, which even the law-making power is bound to respect.

One of these rights is that he shall not be compelled to give evidence that may be used against him in a criminal prosecution, in other words, he may not be compelled to do that which may criminate himself. The framers of the act of 1842 were careful to provide that no answer which the defendant was required to make as a witness should be used against him in any other suit or prosecution. But this act of 1879 makes no provision of that kind, and yet, as has been well shown by the learned counsel for the defendant, the initial proposition is to compel the debtor to reveal that which is made a misdemeanor by the Crimes Act of 1860. This cannot be done. *Galbreath v. Eichelberger*, 3 Yeates, 515. And as this enactment proposes on its face to force the debtor to forego a constitutional right with which the legislature has no power to interfere, it is utterly void and worthless. No such attempt has ever heretofore been made in Pennsylvania, and it is to no purpose to refer to the act of 1842, for that act leaves the option with the defendant. He may verify his allegations by his affidavit, but if he does so he submits himself as a witness, and may be examined by the complainant. Even then, when he thus voluntarily submits himself, the act protects him in that it not only prohibits the use of the evidence so given from being used in any prosecution, but also in any suit against him. *Uhler v. Maulfair*, 11 Harris, 481. The act of 27th of March, 1865, is still less to the point, for it cer-

tainly does not follow that because his adversary as a witness, he may then be compelled to that which would criminate him and remain, though the right to refuse to answer as a party is taken away. The argument is not sound; but the counsel for the defendant has cited a number of authorities to prove that a compulsory order of the court, sworn against him, and hence without a sufficient protection. This is true, and if a witness swears under an arbitrary compulsion to have been subjected. *Regina v. Garbett*, in that case it was held that statements made by a witness appealed to the court to be excused if they cannot be admitted to prove him guilty. Statements must be regarded as given upon the same principle that confessions cannot be received to affect the defense.

It is thus manifest that arbitrary compulsion of a court stand on no higher ground than that of natural persons. In either case, if a witness swears, the evidence thus produced is against him.

As then the act of 1879 contravenes the Bill of Rights, it must be regarded as void.

The order of the court below discharging the prisoner is affirmed.

COMMONWEALTH

(97 Penn. St.

Notary public — liability

A notary public is not liable in damages for negligence unless the plaintiff affirmatively alleges a breach of duty.

DEBT on a notary's bond. The plaintiff was nonsuited below.

John G. Johnson, for plaintiff in error.

R. C. McMurtrie and *Joseph M. Pile*, for defendants in error.

MERCUR, J. This action was against a notary public and his sureties on his official bond. The complaint that he certified to one Abram P. Beecher having personally appeared before him and in due form of law acknowledged a certain indenture of mortgage to be his act and deed, when in fact the person who appeared before him and made the acknowledgment was not Abram P. Beecher, whereby said plaintiff was injured.

The plaintiff called Abram P. Beecher, who owned the lot described in the mortgage on which the notary made the certificate. He testified that this mortgage was not executed by him, nor by his authority, and that he never made any acknowledgment thereof, or of any mortgage on that property, before the notary, or before any person. The plaintiff testified, that relying on the supposed validity of the mortgage and the record thereof, he bought and paid for the mortgage.

The question to be considered is, what proof is necessary to make the notary legally liable to one injured by the making of such certificate untrue in fact?

It is well settled that the certificate of a judge, or a justice of the peace, of the acknowledgment of a deed or mortgage is a judicial act. *Withers v. Baird*, 7 Watts, 227; *Jamison v. Jamison*, 3 Whart, 457; *Heeter v. Glasgow*, 29 P. F. Smith, 79; *Singer Manufacturing Co. v. Rook*, 3 Norris, 442.

Conceding such to be the effect of a certificate of a judge or justice, yet it was contended on the argument that like effect should not be given to the certificate of a notary. Why not? He is a public officer commissioned by the governor. He is acting under oath, like other officials in the performance of judicial duties, to "well and faithfully perform the duties of his office." The second section of the act of 10th August, 1864, Purd. Dig. 1097, expressly gives power to "each notary public of this Commonwealth," *inter alia* "to take and receive the acknowledgment or proof of all deeds, conveyances, mortgages, or other instruments of writing, touching or concerning any lands, tenements or hereditaments situate, lying and being in any part of this State, * * * as fully, to all intents and purposes whatsoever, as any judge of

the Supreme Court, or president or associate judge of any of the Courts of Common Pleas, or any alderman or justice of the peace within this Commonwealth." As then a notary is authorized to take the acknowledgment as fully, to all intents and purposes, as a magistrate can do, it follows the same effect should be given to his certificate of acknowledgment. It was so held in *Hornbeck v. Building Assoc.*, 7 Norris, 64. Whatever officer is authorized to take the acknowledgment, to him is given a judicial duty, and when he performs it it becomes a judicial act, and has the effect of a record.

This action then is to recover damages flowing from the incorrect manner in which the defendant performed an official act. The rule as to the liability of an officer performing a ministerial duty does not apply.

The plaintiff also called and examined the defendant notary. He testified that at the time of putting his hand and seal to the acknowledgment he did not know Abram P. Beecher, did not remember that he had ever seen or heard of him before ; had no knowledge of the matter, except what appears on the acknowledgment ; frequently some one whom he knew brought in the person and introduced him ; he was satisfied at the time it was all right, but does not remember what took place. He added, " the paper was undoubtedly signed before me. I don't remember that I did or did not take any precaution to identify the person making the acknowledgment, but I know I must have been satisfied at the time." The substance of his evidence therefore is that while he does not recollect what inquiries or statements were made, yet he knows he must have been satisfied as to the identity of the person, and that it was all right at the time the acknowledgment was taken. No evidence was given conflicting with or impairing this evidence of the defendant. The legal presumption is he acted on reasonable information, and did his full duty. His absence of memory as to the details of what occurred does not destroy that presumption. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty. This is neither proved nor averred. A mere mistaken conclusion imposes no legal liability on the defendant. The learned judge was clearly right in ordering a compulsory nonsuit and in refusing to take it off.

Judgment affirmed.

COMMONWEALTH V. MCHALE.

(97 Penn. St. 397.)

Criminal law — fraud in election.

Fraud in an election of public officers is indictable at common law. (*See note, p. 818.*)

INDICTMENTS for offenses connected with a public election. The opinion shows the facts. The court below quashed the indictments.

Guy E. Farquhar, special district attorney, *C. W. Wells*, and *F. W. Hughes*, for the Commonwealth.

Lin Bartholemew, *John A. Nash*, *James B. Rielly* and *John W. Ryan*, for defendants in error.

PAXSON, J. The court below quashed the indictment in each of the above cases upon the ground that the offenses charged were barred by the statute of limitations. If, as was assumed by the learned judge, the indictments are under the act of July 2, 1839, and its supplements, and the limitation of one year contained in said act is not enlarged by the 77th section of the Criminal Procedure Act of 31st March, 1860, his conclusion is not inaccurate. A careful comparison of the several indictments with the act of 1839 and its supplements lead us to the conclusion that they are not laid under it, and hence do not come within its limitation. One of them, *Com. v. John J. Kelly*, No. 300, Jan. T. 1880, may have been intended to come within the provisions of section 106 of said act, but the indictment does not charge the precise offense defined in said section, although it does one of a similar nature. Nor are we able to find any other act of assembly which will sustain these indictments. If however the acts charged are offenses at common law they would not come within the limitation claimed for the act of 1839. The 178th section of the Crimes Act of 31st March, 1860, Pamph. L. 425, provides that "every felony, misdemeanor or offense whatever, not specially provided for in this act, may and shall be punished as heretofore." This is a saving section, leaving every crime not specially provided for in this act punish-

able as heretofore. Report on Penalties for Obstruction of Justice, 2 P. F. Smith, 243.

The indictment against Anthony Schalk. In the first count it is charged that he did unlawfully and feloniously count and return of the votes cast at said election in said election district known as the list of voters, of the names of twenty-one persons whose names are on said count charges that with like intent he did cast at said election in said election district twenty-one ballots, false and fraudulent, to wit, twenty-one ballots," etc. The second count charges that with the same like intent he did, "with the commission of said election, undertake and did cast by the electors voting at said election, and did falsely, fraudulently, maliciously and unlawfully, make and return a false and fraudulent count of said ballots, to wit, two hundred and eleven votes were cast for Schalk for the office of district attorney, in fact he did not receive more than twenty-one votes," etc.

The indictment against James Schalk. Similar intent to procure a false count of the ballots cast at said election, in said election district, to wit, twenty-one ballots, false and fraudulent, to wit, twenty-one ballots," etc.

The indictment against John J. Schalk. The same offense as is set out in the indictment against McHale.

Some of these offenses, perhaps, are not covered by the act of 1839 and its supplement. The defendants were not indicted as such.

It must be conceded that offenses of this kind, which affect the fairness of elections are of a grave nature. Is it at the common law? This is a comparatively new question. In considering this question, we have no way of authority to guide us.

It was assumed by the learned counsel for the defendants that an indictment will not lie at common law for such acts. In their printed argument they dismiss the subject with this brief remark : “ Offenses against the election laws are unknown to the common law ; they are purely and exclusively of statutory origin.” It may safely be admitted that if the question depends upon the fact whether a precise definition of this offense can be found in the text books, or perhaps in the adjudged English cases, the law is with the defendants. This however would be a narrow view, and we must look beyond the cases and examine the principles upon which common-law offenses rest. It is not so much a question whether such offenses have been so punished as whether they might have been.

What is a common-law offense ? The highest authority upon this point is Blackstone. In ch. 13 of vol. 4, of Sharswood’s edition, it is thus defined: “ The last species of offenses which especially affect the Commonwealth are those against the public police or economy. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society and are not comprehended under any of the four preceding series. These amount some of them to felony, and others to misdemeanors only.” The learned author then proceeds to define certain offenses of both classes which are among the crimes against the public police or economy. The felonies I will omit. The misdemeanors are: 1. Common or public nuisances, of which a large variety are given, commencing with obstructions to public highways and ending with common scolds. 2. Idleness. 3. Sumptuary laws. 4. Gaming. 5. Destroying game. These, as the text shows, are but illustrations. A large number of these and other common-law offenses are now and have for many years been regulated by statute in England. But in most instances the statute is merely declaratory of the common law, the object being to define the crime with greater accuracy or to increase the punishment.

The above quotation from Blackstone is in harmony with other text writers. Bishop in his work on Criminal Law, vol. 1, §§ 358

and 368 (1st. ed.), says: "The government requires its subjects to do more than simply abstain from attempting its overthrow. It requires them to give, when called upon, their active assistance to it, and at all times to refrain from casting obstructions in the way of its several departments and functions. Therefore every violation of these duties, being sufficient in magnitude for the law to regard, is criminal. * * * We see it to be of the highest importance that persons be elected to carry on the government in its various departments, and that in every case a suitable choice be made. Therefore any act tending to defeat these objects, as forcibly or unlawfully preventing an election being held, bribing or corruptly influencing an elector, casting more than one vote, is punishable under the criminal common law." Mr. Wharton in his work on Criminal Law, vol. 1, § 6 (6th ed.), places the giving of more than one vote at an election as among the misdemeanors at common law. The Supreme Judicial Court of Massachusetts in two cases has recognized the same doctrine. The first was *Commonwealth v. Silabee*, 9 Mass. 417, which was an indictment charging that the defendant did willfully, fraudulently, knowingly and designedly give in more than one vote for the choice of selectmen of the said town of Salem at one time of balloting, etc." After conviction the defendant moved in arrest of judgment that there was no statute covering the offense. It was said by the court: "There cannot be a doubt that the offense described in the indictment is a misdemeanor at common law. It is a general principle that where a statute gives a privilege, and one willfully violates such privilege, the common law will punish such violation. In town meetings every qualified voter has equal rights, and is entitled to give one vote for every officer to be elected. The person who gives more infringes and violates the rights of other voters, and for this offense the common law gives the indictment." The other case is *Commonwealth v. Hoxey*, 16 Mass. 385. The defendant was charged with disturbing a town meeting assembled to make choice of town officers for the political year then ensuing, and that the said defendant, "intending as much as in him lay to prevent the choice of said selectmen according to the will of the electors, and to interrupt the freedom of election, unlawfully and disorderly did openly declare that the old selectmen should not be chosen, and attempted repeatedly to take from the box, which contained the ballots of the electors, the votes of the electors," etc. The defendant

pleaded guilty to the indictment, and moved in arrest of judgment; "because the said indictment purports to be founded upon a statute law of the Commonwealth; whereas there is no such statute in the State making the facts set forth in the indictment an offense against the Commonwealth; and because the facts set forth in the indictment do not amount to an offense at common law." The court, after admitting there was no statute to meet the case, proceeded to say: "The remaining question is, do the facts charged amount to an offense at common law? On this question we entertain no doubts. Here was a violent and rude disturbance of the citizens, lawfully assembled in town meeting, and in the actual exercise of their municipal rights and duties. The tendency of the defendant's conduct was to a breach of the peace, and to the prevention of elections necessary to the orderly government of the town, and due management of its concerns for the year. It is true that the common law knows nothing perfectly agreeing with our municipal assemblies. But other meetings are well known and often held in England, the disturbance of which is punishable at common law as a misdemeanor. In this Commonwealth town meetings are recognized in our Constitution and laws; and the elections made and business transacted by the citizens at those meetings lie at the foundation of our whole civil polity. If then there were no statute prohibiting disorderly conduct at such meetings, an indictment for such conduct might be supported." While the court put this case partly upon the ground that the defendant's conduct tended to a breach of the peace, it is evident the principal reason was the interference with the rights of the electors, which, as the learned judge truly said, "lie at the foundation of our civil polity," and it may be safely asserted that every fraud upon the ballot tends directly to a breach of the public peace if not to revolution and civil war.

We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public police and economy.

It needs no argument to show that the acts charged in these indictments are of this character. They are not only offenses which affect public society, but they affect it in the gravest manner. An offense against the freedom and purity of elections is a crime against the Nation. It strikes at the foundation of republican institutions. Its tendency is to prevent the expression of the will of the people

elections. When this confidence is once destroyed the end of popular government is not distant. Surely, if a woman's tongue can so far affect the good of society as to demand her punishment as a common scold, an offense which involves the right of a free people to choose their own rulers in the manner pointed out by law is not beneath the dignity of the common law, nor beneath its power to punish. The one is an annoyance to a small portion of the body politic; the other shakes the social fabric to its foundations.

We are of opinion that the offenses charged in these indictments are crimes at common law. We regard the principle thus announced as not only sound but salutary. The ingenuity of politicians is such that offenses against the purity of elections are constantly liable to occur which are not specifically covered by statute. It would be a reproach to the law were it powerless to punish them.

It follows from what has been said that it was error to quash the indictments.

The judgment is reversed in each case and a *procedendo* awarded.
Judgment reversed.

NOTE BY THE REPORTER.—In *State v. Jackson*, Maine Supreme Court, March, 1881, it was held that bribery at a municipal election is a misdemeanor at common law. The court said: "It was an offense at common law in England. 1 Russ. on Crimes, 154; *Plympton's case*, 2 Ld. Raym. 1377; *Rex v. Pitt*, 3 Burr. 1328. The common law of England, upon the subject of bribery, fraud and corruption at elections, is generally adopted as the common law of this country. *Commonwealth v. Silsbee*, 9 Mass. 417; *Commonwealth v. Harey*, 10 id. 385; 1 Bish. Crim. Law, 855; *Welsh v. People*, 65 Ill. 58; *State v. Purdy*, 35 Wis. 224; s. c., 17 Am. Rep. 485; *State v. Collier*, 72 Mo. 13; *People v. Thornton* (N. Y. Sup. Ct.), 24 Alb. L. J. 441 Bishop, in his work on Criminal Law, vol. 4, § 922, says: 'We see it to be of the highest importance that persons be elected to carry on the government in its various departments, and that in every case a suitable choice be made. Therefore, any act tending to defeat these objects, as forcibly or unlawfully preventing an election being held, bribing or corruptly influencing an elector, casting more than one vote, is punishable under the criminal common law.'" The court also cite and quote at large from the principal case.

HEPLER v. MT. CARMEL SAVINGS BANK.

(97 Penn. St. 420.)

Negotiable instrument — alteration — filling in date — evidence — of deceased witness.

Where a note is indorsed, the date having been left blank, +
that the indorsee is authorized to supply it.

Hepler v. Mt. Carmel Savings Bank.

Where a witness, called on to testify to the previous testimony of a deceased witness, cannot recollect the very words, he may state in his own language the facts detailed, as impressed on his mind at the time.

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

William A. Marr, for plaintiff in error.

D. C. Henning, for defendant in error.

GORDON, J. The promissory note, the subject of this suit, was drawn by Nathan Bolich to the order of Daniel M. Hepler, in the sum of \$2,500, payable sixty days after date, at the Mt. Carmel Savings Bank. By Hepler it was indorsed for the accommodation of Bolich, and by him, Bolich, transferred to the bank. When this note was presented on the trial of this case, it was discovered that the date had been altered by striking out the word "Apr.," and substituting the word "May" in its place. On objection by the defendant, Hepler, the court below properly refused to admit the note in evidence until the alteration was explained. The bank then offered proof to show that when Bolich presented the note for discount it was altogether without date, and that Bolich afterward had himself filled in the date "Apr. 4," and immediately, on his attention being called to the mistake, had stricken out the word "Apr." and inserted "May." We think the admission of this evidence and its submission to the jury was proper. Whilst it is admitted that any material alteration in a note, after its indorsement, will invalidate it as to the indorser, yet where it is indorsed without date, the presumption necessarily is that the drawer or indorsee is authorized to fill in the date. This is undoubtedly the rule where the sum is left blank. *Worral v. Gheen*, 3 Wright, 496. And no good reason can be urged why the same rule should not apply to the date. This note was drawn for the renewal of a former one, and as the parties may not have known the exact time when the former fell due, the reason for its being indorsed without date would in that event be obvious. We think, then, that under the circumstances, this testimony was rightly admitted; hence the first exception of the plaintiff in error is dismissed.

The second exception relates to the admission of the evidence of H. D. Rothermel, a deceased witness, given at a previous trial of this same case, before a board of arbitrators. To prove what that

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evidence had been, a Mr. Montelius was called, who on preliminary examination said he could not give the words that had been used by the witness, but could give the substance of his evidence on some points, and those points were as to the date and condition of the note when presented for discount. On cross-examination, he said he could not recall to recollection any of the cross-examination of Rothermel, except that as to the date of the note and circumstances attending it he did not contradict himself. Under such a want of recollection of what the dead witness had sworn on cross-examination, this testimony would not be admissible, for there ought to have been such a recollection of the cross-examination that the witness could give at least the substance of it, otherwise, as was said in *Wolf v. Wyeth*, 11 S. & R. 156, "to give what he swore on his examination in chief and omit his cross-examination would be to deprive the opposite party of his cross-examination."

Such testimony would be altogether one-sided, and for that reason inadmissible. Montelius however upon further interrogation, says, "the evidence was the same on the cross-examination as it was on the examination in chief, relating to the date of the note and the attending circumstances." From this we must understand that his recollection of the cross-examination was substantially the same as that of the examination in chief; that is, he had the same general recollection of the one as of the other, but no special, verbal recollection of either. But we are inclined to think, that under our own authorities, this general, or as it is sometimes called, substantial, recollection of what the deceased witness said, was sufficient to warrant its reception.

It is true, the contrary is held by English authorities, and these authorities have been followed by Chief Justice SHAW in *Warren v. Nichols*, 6 Metc. 261; but on the other hand, Mr. Greenleaf favors the more liberal rule as adopted in Pennsylvania. And we, whatever our private opinions might be, must be governed by the cases of *Cornell v. Green*, 10 S. & R. 14, and *Wolf v. Wyeth*, *supra*. Furthermore, by attention to the language of Chief Justice GIBSON, in the case of *Cornell v. Green*, we may readily formulate the rule governing cases of this kind. "I take it," he says, "that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence; and this on the ground that it is the best

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evidence of which the nature of the case is susceptible. * * * I cannot therefore see why the same necessity which opens the way for secondary evidence of the very words of a deceased witness, should not also open the way for the substance of his testimony when his very words cannot be recollected; or discover the policy of a rule which would shut out the little light that is left, merely because it may not be sufficient to remove every thing like obscurity." From this I take the rule to be, where the witness on the stand cannot recollect the very words of the deceased witness, he may state in his own language the facts as detailed by that witness, as they were impressed on his mind at the time; and this applies as well to the cross-examination as to the examination in chief. All that is required is that the recollection of the witness be reasonably clear as to the fact testified to, and how, if at all, such testimony was affected by the cross-examination. As a rule, this is all that can be required of ordinary witnesses, and the adoption of a greater degree of strictness would result in the total exclusion of such evidence, for the exception is rare where a conscientious witness will undertake to do more than this. Judging by this rule, we think the evidence complained of in this case was well admitted.

The judgment is affirmed.

Judgment affirmed.

SUSQUEHANNA MUTUAL FIRE INSURANCE COMPANY v. TUNKHAN-
NOCK TOY COMPANY, LIMITED.

(97 Penn. St. 424.)

Insurance — notice of loss — mailing.

Where a fire insurance policy provides that notice of losses shall forthwith be given to the secretary of the company, the mailing of such notice, properly addressed, is presumptive evidence of service.*

ACTION on a policy of fire insurance. The opinion and head-note show the point. The plaintiff had judgment below.

Wm. M. Piatt and Fleming & McCarrell, for plaintiff in error.

S. W. Little and W. E. & C. A. Little, for defendant in error.

* See *Austin v. Holland* (69 N.Y. 571), 25 Am. Rep. 246, and note, 249. To same effect, *Bell v. Lycoming F. Ins. Co.*, 19 Hun, 238.

Susquehanna Mut. Fire Ins. Co. v. Tunkhannock Toy Co., Limited.

TRUNKEY, J. Notice of dishonor of bills or non-payment of notes, where the parties do not live in the same town, is usually sent by mail. This usage has settled into law, so that the legal presumption is conclusive that the notice was received, from the fact that the sender duly delivered it in the post-office properly addressed. And when it may be sent by mail, if sent by a messenger, it must be delivered within the time that the mail would have taken it. Necessity and convenience led to the usage and legal presumption. Unless notice of dishonor be promptly given, the drawer of a bill and indorsers of a bill or note will be discharged from liability, and where the parties live at considerable distance, the employment of a messenger would be burdensome.

Where a policy requires notice of loss to be given forthwith by the assured to the assurer, and is silent as to mode of service, is not the necessity equally great for adopting as a legal presumption, *prima facie* till disproved, that the assured received the notice, from the fact that it was properly addressed and delivered in the post-office? It is common to send by mail the policies, the notices of loss, proofs of loss, and in case of mutual companies, the notices of assessment. In a valuable work (Wood on Ins. 702), it is remarked, that in the construction of the policy and its various conditions, the evident intent and purpose of the parties is to be looked to, and as it is the case with insurance companies that they are generally located at great distance from the insured, it cannot reasonably be supposed that they expected or intended that the assured should, in person or by agent, deliver the proofs of loss, but that he should execute them with due diligence, and with equal diligence send them to the company by mail, which is now the principal medium through which the commercial business of the world is transacted. A contrary rule gives undue force to arbitrary conditions that jeopardizes too seriously the interests of the assured. This view seems correct with reference to notice of loss required to be sent forthwith. With respect to proofs of loss, where time is allowed for delivery, there is not the same necessity and possibly not the same intent of the parties. Considering the widely extended and peculiar business of insurance, the evident general understanding of the parties as to services of notices, as well as the well-known usage when a notice is required to be sent immediately to a company, not in the same town where the insured lives, but located considerable distance therefrom, the sending of it by mail

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is *prima facie* evidence of service. It may not be conclusive, as in case of commercial paper, but the reason is quite as strong that it should be *prima facie* sufficient. The usage and the rule of evidence arise from the intent and purpose of the contracting parties as well as their convenience or necessity. It is not necessary to remark on the doctrine in *Kinney v. Altwater*, 27 P. F. Smith, 34; *Bank v. McManigle*, 19 id. 156, and like cases, which are within the general rule that there is no presumption of law that a letter, mailed to one at the place he usually receives his letters, was received by him.

The policy in this case covered property at Tunkhannock, and the company is located at Harrisburg. It is stipulated that notice of loss shall be given forthwith to the secretary of the company; and proofs of loss delivered to said secretary within thirty days after said loss. The assured was required at once to send notice to the secretary at Harrisburg, which he did by mail, if the testimony is believed. There was no attempt to disprove the receipt of the notice. The court charged that there is a presumption that a letter containing a notice of loss by fire, addressed to the secretary of the company at the home office of the company, and duly mailed, is received by the company, and the jury may infer actual notice therefrom. We discover no error in the first, fourth and fifth specifications.

[Minor matters omitted, but for another reason.]

Judgment reversed and a *venire facias de novo* awarded.

ASH V. GUIE.

(87 Penn. St. 493.)

Partnership — Masonic lodge.

The members of a Masonic lodge are presumptively not partners.

ASSUMPSIT on a certificate of indebtedness by a Masonic lodge, executed by the master and wardens. The debt was incurred for the erection of a lodge building. The action was against more than one hundred members. The court below directed a verdict for the plaintiff. The opinion states other facts.

R. E. Monaghan and *P. F. Smith*, for plaintiff in error.

R. Jones Monaghan, for defendant in error.

TRUNKY, J.¹ One of the defendants, called by plaintiffs, testified : “ The full title of our lodge is Williamson Lodge, No. 309, F. and A. M.; F. and A. M. means Free and Accepted Masons ; the purposes of our lodge are charitable, benevolent and social.” This is the evidence as to the objects for which the association was formed, and without proof of its constitution or rules respecting admission of members and the management of its affairs, it was held to be a common partnership. A partnership has been defined to be a “ combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit.” It may be formed, not only for every kind of commercial business, but for manufacturing, hunting, and the like, as well as for carrying on the business of professional men, mechanics, laborers, and almost all other employments. It would seem that there must be a community of interest for business purposes. Hence voluntary associations or clubs, for social and charitable purposes and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. Pars. on Part. 6, 36, 42.

A benevolent and social society has rarely, if ever, been considered a partnership. In *Lloyd v. Loaring*, 6 Ves. 773, the point was not made, but Lord ELDON thought the bill would lie on the ground of joint ownership of the personal property in the members of a Masonic lodge; there was no intimation that they were partners. Where a society of Odd Fellows, an association of persons for purposes of mutual benevolence, erected a building, which was afterward sold at sheriff's sale in satisfaction of mechanics' liens, in distribution of the proceeds it was said, that as respects third persons, the members were partners and that lien-creditors, who were not members, were entitled to preference as against the liens of members. *Babb v. Reed*, 5 Rawle, 151. Had the members been called joint-tenants of the real estate the same principle in the distribution would have applied. In *Fleming v. Hector*, 2 M. & W. 172, Lord ABINGER stated the difference between a body of gentlemen forming a club and meeting together for one common object, and a partnership where persons engage in a community of profit and loss, and each partner has the right of property for the whole, and in any ordinary transactions may bind the partnership by a

credit. He held that a club and its committee must stand on the ground of principal and agent, and that the authority of the committee depends on the constitution of the club, which is to be found in its own rules. After noting the rules of the club in the case before him, he says: "It therefore appears that the members in general intended to provide a fund for the committee to call upon. I cannot infer that they intended the committee to deal upon credit, and unless you infer that that was the intention, how are the defendants bound?" A mutual beneficial society partakes more of the character of a club than of a trading association. Every partner is agent for the partnership, and as concerns himself he is a principal, and he may bind the others by contract, though it be against an agreement between himself and his partners. A joint-tenant has not the same power, by virtue of the relation, to bind his co-tenant. Thus one of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of evidence from which an implied authority for that purpose can be inferred. *Ricketts v. Bennett*, 4 M. G. & S. 686 (56 Eng. C. L.).

Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner so that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of the members, had a right to contract debts for the building of a temple, which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it. Those who participated in the erection of the building, by voting for and advising it, are bound the same as the committee who had it in charge. And so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade.

This unincorporated association had a seal which the officers were

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authorized to use for certain purposes. Some of those who engaged in the business of borrowing money directed it to be affixed to the certificate of indebtedness. All who did it adopted it as their seal for the specific purpose. It was not the seal of a corporation nor intended as such. The parties borrowed the money in the name of the lodge and gave the certificate in same name, and adopted a common seal. They cannot repudiate it in good faith to the lender. He loaned the money on a sealed instrument, in many respects better than a simple contract. Those who advised affixing the seal should be held the same as their officers who signed the certificate. Were the members partners without evidence of agreement between them that the seal should be affixed to contracts, those not assenting to its use in that way would not be bound by a sealed instrument, though given for a debt for which all were liable. *Schmertz v. Shreeve*, 12 P. F. Smith, 457. The learned judge was right in ruling that the certificate was a sealed instrument, but not, under the evidence, in holding that it was authorized by all the members.

[Omitting other points.]

Judgment reversed, and *venire facias de novo* awarded.

Judgment reversed.

WIREBACH v. FIRST NATIONAL BANK.

(97 Penn. St. 543.)

Negotiable instrument — indorser — lunacy of.

No action will lie on an accommodation indorsement of a promissory note by a lunatic, even in favor of an innocent holder.

ACTION on a promissory note. The head-note and the opinion state the point. The plaintiff had judgment below.

Edward J. Fox, and *W. S. Kirkpatrick*, for plaintiff in error.

W. W. Schuyler, and *William Muchler*, for defendant in error.

TRUNKEY, J. Where a person fairly and in good faith sells property or loans money to a lunatic who appears to be sane and is not known by the vendor or lender to be insane, and who has not been found to be a lunatic by judicial proceedings, and the lunatic

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receives and uses the same, whereby the contract becomes so far executed that the parties cannot be placed *in statu quo*, such a contract cannot afterward be set aside, or payment refused by the lunatic or his representatives. *La Rue v. Gilkyson*, 4 Barr. 375; *Beals v. See*, 10 id. 56; *Lancaster County Bank v. Moore*, 28 P. F. Smith, 407; s. c., 21 Am. Rep. 24; *Wilder v. Weakley*, 34 Ind. 181; *Elliot v. Ince*, 7 DeG., M. & G. 475, 487. In *Elliot v. Ince* it is remarked that "the result of the authorities seems to be that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." Chief Justice GIBSON based the lunatic's liability in such cases on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it; he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes.

There can be no binding executory agreement where one of the parties is bereft of reason; a capacity to contract is absolutely necessary. An insane person is incapable of committing a crime or making a contract, yet it is common to speak of his torts and his contracts, and on many of them he is liable in a civil action. One who knowingly sells goods to an insane person, necessary for his use, may recover their value, on the same principle that an infant is liable for necessities he purchases. His liability for necessities and suitable articles is deemed rather a benefit than a disadvantage to him.

It is noticeable that in this Commonwealth, where the lunatic has been held liable, there was neither imposition nor want of full consideration for the amount of liability, and when not for necessities, the opposite party had no knowledge of the lunacy. Thus, in *Lancaster County Bank v. Moore*, *supra*, stress was put on the fact that the bank had no knowledge of Moore's insanity, and in good faith loaned the money which was placed to his credit and checked out by him. It was held to be within the doctrine of *Beals v. See*, that the contract was executed so far as the consideration was concerned, and that the rule which prevents insane persons obtaining the property of innocent parties and retaining both property and price, required payment of the note. *Snyder v. Laubach*, 7 W. N. C. 464, is where Yost's indorsement of the note was merely a renewal of an indorsement made when he was

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unquestionably of sound mind; and it was held that he was clearly liable on the note of which the note in suit was a renewal; there was full consideration, and the case was within the decision of *Lancaster County Bank v. Moore*. The consideration was a debt for the amount of the renewal note. So in *Kneedler's Appeal*, 92 Penn. St. 428, a judgment entered on a bond by virtue of a warrant of attorney was allowed to stand because the lunatic, acting by advice of counsel, received the full consideration which he prudently applied in payment of his undisputed debts, and the plaintiff had no knowledge of the insanity when the money was loaned. Of like purport are every one of the cases decided elsewhere, which are cited and relied on by the defendant in error. In most if not all cases where an insane person has been held answerable as if his contract were binding, he received and enjoyed an actual benefit from the contract.

The question now presented is: Will an action lie on the accommodation indorsement of a promissory note by a lunatic? If the determination of this was not made, it was very clearly indicated in *Moore v. Hershey*, 9 Norris, 196. There the action was by an indorsee against the maker of a promissory note, and evidence was offered to prove that the maker had received no consideration for the note, which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane, but the offer was rejected, the court below ruling that as the note in suit was commercial paper and the plaintiff a holder for value, the consideration could not be inquired into. This was held to be error. PAXSON, J., said: "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic however he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration."

"There must be a limit to the civil responsibility of persons of unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men."

If the holder could recover against one who was insane when he

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indorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or indorses a note may, by his representative, plead his infancy as a complete defense. In like manner a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder who may have given value to the indorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him or for want of consideration; then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. Nor would a nominal sum be sufficient. It is said that the law protects those who cannot protect themselves, but it would be sorry protection, if one holding a valid note against a helpless man for four thousand dollars could get it renewed for ten thousand dollars, and recover the full amount of the renewal note. The consideration must be fair and conscionable, and then it is proper. When it is a pre-existing debt, or money loaned, its measure is certain, and the insane man is liable for no more than the amount of such debt or loan. The holder of a madman's note stands in no better position than the payee. An accommodation maker or indorser in fact is a surety for the principal debtor, and when he is an infant or an insane person, he or his representatives may defend as in other forms of contract. We are not persuaded that commercial or public interests require an adjudication that a lunatic who signs a contract as surety or as accommodation maker or indorser, is liable for the debt of another man.

This action is upon a note for \$10,075.92, which was given to the bank to take up notes of Stocker & Co., which were indorsed by Richards and Christman. J. C. Wirebach was accommodation indorser, and this was known to the bank. He was an indorser on one of the former notes for \$4,400. It is alleged by the defense that Wirebach was incapable of making a contract by reason of insanity, not only at the date of the note in suit, but also at the date of said former note. If this fact were established, the verdict should have been for defendant. And if he were sane when he indorsed the prior note, and insane at the time he indorsed the note in suit, he is not liable for the one in suit, as it is not a mere renewal note. The learned judge of the Common Pleas instructed the jury that "to entitle the defendant to a verdict in this case,

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he must establish by satisfactory evidence that Wirebach was of unsound mind on the 7th of December, 1876, and that the bank had notice or knowledge of such unsoundness." We are of opinion that it was error to rule that the defense failed unless the bank had such notice or knowledge. This ruling pervaded the charge and answers to points ; corrected, there is no occasion for special remark on each of the first nine specifications of error. We are not satisfied that the court erred in charging that there was no evidence of fraud, misrepresentations or undue influence on the part of the bank, or of fraudulent practices by Christman on Wirebach to authorize submission of these questions. Fraud is not to be presumed from the mere fact of indorsement, even by a man feeble in mind and body. It is common for one friend, though possessed of strong mind, to ruin himself financially by indorsing for another, and while it is very imprudent if not rash, it has never been considered unconscionable, except when procured by some artifice or fraud, of which there must be some evidence. Were the indorser weak-minded, less evidence would be required to establish the fraud.

[Minor matters omitted.]

The learned judge seems to have carefully considered his rulings, and to have fairly submitted to the jury to determine as to the alleged insanity of Wirebach at the time of the indorsement. But for the single error relative to notice to or knowledge by the bank of the insanity of Wirebach, the cause must go back for another trial.

Judgment reversed, and a venire facias de novo awarded.

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See CRIMINAL LAW, 227.

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See NEGOTIABLE INSTRUMENT, 492.

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AGENCY.

1. **Liability of agent for tort.]** The defendant, as president of a political club, ordered a display of fire-works in the public street in front of a building where a meeting of the club was being held. He paid for the fire-works the money being raised by individual subscriptions. The fire-works exploded and injured the plaintiff. *Held*, that he could recover therefor of the defendant. *Jenne v. Sutton* (Vroom), 578.
2. **Liability of principal for agent's fraud.]** The fraud of an agent in effecting a sale cannot be imputed to his innocent principal. *Kennedy v. McKay* (Vroom), 581.
3. **Sale — delivery to carrier — stoppage in transit by agent — usage.]** The owner of cotton in the hands of his agent sold it, and the agent at his direction delivered it to a carrier, taking a shipping receipt, in the name of

AGENCY — *Continued.*

the principal, conditioned for the delivery of the cotton to the purchaser. The agent retained the receipt, and his draft on the purchaser for his advances to the owner on the cotton having been refused, he demanded and received back the cotton from the carrier. *Held*, that the purchaser could recover therefor from the carrier. *Gwyn v. Richmond & Danville Railroad Company* (N. C.), 708.

Declarations of agent.] See EVIDENCE, 526.

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ATTORNEY.

Admission — clerkship.] The rule, directing that every candidate for admission to practice as attorney must have served a regular clerkship of four years with some practicing attorney, implies that the applicant must actually and regularly have assisted the attorney in his business as clerk during that period, and not merely have studied law in his office. *In Matter of Dunn* (Vroom), 600.

ATTORNEY AND CLIENT.

1. **Disbarment — withdrawal of charges by client.]** Criminal proceedings having been taken by a client against his attorney for embezzlement of the client's funds, and upon his complaint proceedings having also been taken to disbar the attorney, a settlement was made, and the client consented to the entry of *not pros.* *Held*, that this did not prevent the disbarring of the attorney. *In re Davies* (Penn. St.), 729.
2. **Retainers—custom.]** There is no custom in Maine to charge retaining fees in contested cases, so general as to warrant a recovery therefor over and above ordinary charges covering all services rendered. *McLellan v. Hayford* (Me.), 343.

BAILMENT.

- Gratuituous — negligence.]** S., a guest of N., deposited with N. for safe-keeping, without reward or profit, several United States coupon bonds of the aggregate value of \$4,500. These bonds, with the knowledge and consent of S., N. deposited in a box where he kept his own valuables, which he locked and placed in the drawer of a bureau in his bed-room, which drawer he also locked. N., without the knowledge or consent of S., took one of the bonds and hypothecated it as security for a debt upon which he was liable. Thereafter a thief entered the house of N., broke the lock of the drawer and that of the box, and stole the bonds of S. and the papers of N. therefrom. *Held*, that N. was not liable to S. for the bonds taken by the thief. *Schermer v. Neurath* (Md.), 397.

BANK.

1. **Illegal —personal liability of president.]** One who assumes the presidency of a bank without legal organization is responsible for losses incurred by third persons in its management by the subordinate officers, although he supposed the bank was legally constituted, was ignorant of its condition, and did not actively participate in its management. *Hauser v. Tate* (N. C.), 689.
2. **Liability for fraud of officers.]** Plaintiff, a depositor in a National bank, requested a certificate of deposit, drawing interest, for a portion of his deposit. The teller gave him a certificate purporting to be issued by & Co., a private banking firm, and informed him, in presence of the cashier of the bank, that this was the bank's certificate, upon which assurance plaintiff accepted it. The members of the firm were the managing officers of the bank, but had a separate place of business in the same town that the bank was liable to the plaintiff for the amount of it. *Steckel v. First National Bank of Allentown* (Penn. St.), 758.
3. **National — forfeiture for usury — limitation.]** In an action brought by a National bank upon a note upon which the bank charged an usurious interest, the defendant may set off the forfeiture under the National Bank Act, although the suit is in another State.

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the note was discounted, and more than two years after the discount. *First National Bank of Peterborough v. Childs* (Mass.), 474.

See DEBTOR AND CREDITOR, 750.

BANKRUPTCY.

1. **Discharge — new promise.]** To revive a debt discharged in bankruptcy, there must be a distinct and specific promise. A mere acknowledgment of the debt, although implying a promise to pay, is not sufficient. *Riggs v. Roberts* (N. C.), 692.
2. **"Fiduciary character" — factor.]** A debt for money due from a factor to his principal is not created while acting in a "fiduciary character," and is discharged in bankruptcy. *Scott v. Porter* (Penn. St.), 719.

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Inheritance.] A bastard cannot inherit from his mother's ancestors. *Jackson v. Jackson* (Ky.), 246.

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BILL OF LADING.

Delivery for pre-existing debt.] The indorsement of a bill of lading and the delivery of the goods in consideration of a pre-existing debt is valid as against a subsequent innocent purchaser of the goods, whether such transfer was in payment or as collateral security. *Skilling v. Bollman* (Mo.), 537.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENT.

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See ACCESSION, 251; NEGOTIABLE INSTRUMENT.

BOND.

On injunction.] See DAMAGES, 5.

BOUNDARY.

See DEED.

BURIAL AND BURIAL PLACE.

1. **Exclusive right of — disturbance of — measure of damages.]** The plaintiff as a member of a society, acquired an exclusive right of burial in a certain

BURIAL AND BURIAL PLACE — Continued.

lot so long as the ground should remain a cemetery. The defendant, without his consent, buried a child in that lot. *Held*, that an action of trespass *quare clausum fregit* would lie, although the plaintiff had withdrawn from the society. The defendant's conduct being malicious, punitive damages were proper. *Smith v. Thompson* (Md.), 409.

2. **Right of husband as to wife's interment.]** If a husband consented to the burial of his wife in a lot owned by another, but not freely, nor with the intention or understanding that it should be permanent, a court of equity may permit him to remove her body, and the coffin and tombstones furnished by him, to his own land, and may restrain interference with such removal. *Weld v. Walker* (Mass.), 465.

3. **Taxation — exemption — sewer.]** A cemetery was exempted from taxation, and it was forbidden to open any street, lane or road through it. *Held*, that lots in the cemetery along the line of a street were exempt from assessment for building a sewer in the street. *Oliver Cemetery Company v. City of Philadelphia* (Penn. St.), 732.

See NUISANCE, 14.

CANCELLATION.

Of legacy.] *See* WILL, 753.

See INSURANCE, 792.

CARRIER.

1. **Burden of proof.]** Where a passenger by railway is injured by an accident caused by the washing away of the embankment, the occurrence of the accident is presumptive evidence of the carrier's negligence, and this rule applies to a lessee of the railway. *Philadelphia & Reading Railroad Co. v. Anderson* (Penn. St.), 787.
2. **Negligence — insufficient railway bed.]** Where a passenger by a railway is injured by an accident caused by the washing away of the embankment, the carrier is not relieved from liability, although the embankment was constructed by a competent engineer, and the washing away was the result of an unprecedented storm, provided the provision for drainage at the point in question was defective. *Id.*

CERTIFICATE.

See ESTOPPEL, 669.

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See WILL, 445.

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See MORTGAGE.

CIVIL DAMAGE ACT.

1. **Action by husband for intoxication of wife.]** A husband may maintain an action under the Civil Damage Act, for injury to his "means of support"

by the intoxication of his wife, caused by the defendant. *Moran v. Goodwin* (Mass.), 448.

2. **Death of husband.]** Under the Civil Damage Act, a wife cannot maintain an action for the death of her husband, caused by intoxicating-liquor sold him by the defendant. *Barrett v. Dolan* (Mass.), 456.

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See CRIMINAL LAW, 419.

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See SURETY, 346.

CONFESSION.

Of third person.] *See CRIMINAL LAW, 636.*

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See BILL OF LADING, 587.

CONSTITUTIONAL LAW.

1. **Compelling one to give testimony against himself.]** A statute providing for the compulsory examination by a judgment creditor, of his debtor, on oath as to property which the creditor alleges he has fraudulently concealed, such fraudulent concealment being a criminal misdemeanor, and the statute not providing against the use of the testimony on a prosecution for such misdemeanor, *held*, unconstitutional. *Hordman v. Kaufman* (Penn. St.), 802.
2. **Ordinance for selling stray hogs.]** An ordinance authorizing the marshal of a town to seize and sell stray hogs without notice to the owner is unconstitutional. *Varden v. Mount* (Ky.), 208.
3. **Statute extending time for prosecution of offenses already barred.]** A statute extending the time previously limited for the prosecution of criminal offenses is void as to offenses upon which the time previously limited has already run. *Moore v. State* (Vroom), 558.
4. **Taxation of products of other States.]** A tax imposed by the State of Louisiana on coal brought there from Pennsylvania for sale is not unconstitutional as impairing the immunities and privileges of citizens of Pennsylvania, as a regulation of commerce, or as levying a duty on an import. *Brown v. Houston* (La. Ann.), 284.
5. **— equality of.]** A license fee may be exacted by a city from keepers of private markets, although none is imposed on persons selling the like articles in the public markets of the city. *City of New Orleans v. Dubarry* (La. Ann.), 273.
6. **Tonnage duty — regulation of commerce.]** A city ordinance requiring a license fee from owners of tow-boats running on the Mississippi river to and from the Gulf of Mexico does not impose a duty on tonnage, and is not a regulation of commerce, and is therefore not unconstitutional. *City of New Orleans v. Eclipse Tow-Boat Company* (La. Ann.), 279.

CONTEMPT.

Justice of peace — power to punish for.] A justice of the peace has no inherent power to commit for contempt. *Rhinehart v. Lance* (Vroom), 592.

CONTRACT.

1. **To indorse.]** An action lies for breach of a promise, made upon consideration, to indorse a note. *Smith v. Easton* (Md.), 355.
2. **Guaranty — consideration.]** A promise to guarantee a debt already due, made in consideration of the forbearance of the creditor to attach the debtor's goods, is void where there was no valid ground of attachment. *Id.*
3. **Joint — demand for performance.]** Where the performance of a joint contract, not of a partnership, nor a negotiable instrument, depends on demand, a demand on one of the contractors is sufficient. *Rhind v. Hyndman* (Md.), 402.
4. **Public policy — exclusive employment of ferry — restraint of trade.]** A railroad company needing a ferry to complete transportation at its terminus, agreed with a ferry company to give it all its ferrying business at that point, and not to employ any other ferry. The ferry company agreed to furnish the requisite facilities, and transact the business promptly and with dispatch. *Held*, not void as against public policy or in restraint of trade. *Wiggins Ferry Company v. Chicago & Alton Railroad Co.* (Mo.), 519.
5. **— public office.]** The plaintiff and a candidate for the office of tax assessor agreed that if the latter was elected he should appoint the former his chief deputy, at a salary of \$2,500, to be paid from the fees and perquisites of the office, and the latter should become his official bondsman, and perform all the duties of the office except those relating to the poll-tax. *Held* void, as against public policy. *Robertson v. Robinson* (Ala.), 17.
6. **Substitution.]** A., being indebted to C., gave him a written order on B., for goods which B. had contracted to deliver to A. B. accepted the order. *Held*, that C. could not maintain an action on the contract against B. *Rogers v. Union Stone Company* (Mass.), 478.

Of wife for necessaries.] See MARRIAGE, 674.

See SUNDAY, 191.

CONTRACTOR.

See NEGLIGENCE, 463.

CONTRIBUTORY NEGLIGENCE.

See ANIMALS, 76; NEGLIGENCE.

CORPORATION.

1. **Constructive notice to.]** A trustee of a bank, who was also an attorney had actual knowledge of an existing unrecorded deed of lands. With that knowledge he as such attorney afterward wrote and took an acknowl-

CORPORATION — *Continued.*

edgment of a mortgage on the same lands from the same grantor to the bank, and the deed was recorded. *Held*, that the bank was not chargeable with his knowledge unless the fact was in his mind at the time, nor unless he was acting for the bank in the making of the mortgage. *Fairfield Savings Bank v. Chase* (Me.), 319.

2. **Libel.]** A corporation is liable to an action for libel. *McDermott v. Evening Journal* (Vroom), 606.
3. **Malicious prosecution.]** A savings bank is liable to an action for malicious prosecution. *Reed v. Home Savings Bank* (Mass.), 468.
4. **Officer, compensation of.]** An officer of a corporation cannot recover of the corporation for his ordinary official services except by virtue of a special contract for compensation. *Citizen's Nat. B'k v. Elliott* (Iowa), 167.

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Fees of, as damages on injunction bond.] See DAMAGES, 5.

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To assume mortgage.] See MORTGAGE, 617.

CRIMINAL LAW.

1. **Abortion — quickening.]** At common law abortion could not be committed until the woman was quick with child. *Mitchell v. Commonwealth* (Ky.), 227.
2. **Assault.]** Defendant advanced from the opposite side of a street, some twenty steps distant, with a stick and open knife, cursing and threatening to kill the complainant. The complainant retreated into a store, and remained there two or three hours, the defendant meanwhile walking up and down in front of the store and threatening to whip him if he came out. *Held* an assault. *State v. Martin* (N. C.), 711.
3. **Confessions of third persons.]** On a trial for murder, a letter written by another to a third, containing expressions possibly capable of being construed as a confession that the writer committed the murder, is incompetent as evidence for the prisoner; and so of like conversation overheard between other persons, not constituting any part of the *res gestæ*, and not distinctly purporting to be connected with the crime in question. *Greenfield v. People* (N. Y.), 636.
4. **Evidence — dying declarations exculpating accused.]** Dying declarations, not part of the *res gestæ*, are not competent in exculpation of the accused. *Moeck v. People* (Ill.), 38.
5. **— testimony of non-expert as to blood stains.]** A non-expert witness is competent to testify that certain stains were blood. *Greenfield v. People* (N. Y.), 636.
6. **Fraud in election.]** Fraud in an election of public officers is indictable at common law. *Commonwealth v. McHale* (Penn. St.), 808.

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7. **Homicide — negligence — physician.]** patient honestly and to the best of his ability for his death from the medicine (Iowa), 187.
8. **— somnambulism.]** On a trial for and suddenly awakening him, by one is competent to show that the defendant had recently lost much sleep, and had no other than the deceased. *Fain v. Commonwealth*
9. **Indifference of prisoner.]** Where a defendant killed his wife, it is competent to show indifference immediately after the homicide. 636.
10. **Larceny — artifice — title.]** If conspire to induce one to intrust money to one of the parties to a game in which it was impossible for the money, this is larceny. *Miller v. Commonwealth*
11. **— by bailee.]** The owner of horses made an agreement that the defendant was to have the property of the owner till paid for, or a certain period if not paid for. The defendant sold them. *Held* not larceny, nor larceny by receiving. *wealth* (Penn. St.), 762.
12. **— lost property — ignorance of law.]** A person for larceny of lost property, even if he is a colored people in that vicinity, that loses the property, if he can prove that the ownership belongs to the finder. (Mo.), 515.
13. **Lottery.]** Proprietors of a newspaper of circulation, and gratuitously gave to every new subscriber to participate in a distribution of prizes by lot. *Held* a lottery. *State v. Mumford*
14. **Nuisance — profane swearing.]** Profane swearing in the hearing of citizens, continued for a long period, on a single occasion, is an indictable nuisance.
15. **Once in jeopardy — discharge of jury.]** A person indicted for assault and battery, they pleaded guilty, and the judge discharged the jury pending the trial, because one of the jurors was discovered to be a witness in the cause entered into by one of the parties. *Held* bad. *Commonwealth v. McCormick*
16. **Seduction — chaste character — presumption of a woman of "good reputation" —** to prove such reputation. *Zabriski*

CRIMINAL LAW — *Continued.*

17. **Selling intoxicating liquors — social club.]** The officers of a social club, whose steward furnishes the members with food and with beer by the glass, at a fixed price, to be consumed at the club, the money so received being expended for the expenses of the club, are not guilty of "selling" beer within the meaning of an excise law. *Seim v. State* (Md.), 419.
18. **Sentence to imprisonment — escape.]** Where one sentenced to imprisonment at hard labor escapes and is recaptured, the time of his absence cannot be credited on the term of imprisonment. *In Matter of Edwards* (Vroom), 610.
19. **Suspension of sentence.]** On conviction of maintaining a nuisance the court suspended sentence, on payment of costs, so long as the defendant should abate the nuisance. At a subsequent term the court imposed sentence of imprisonment and payment of costs. *Held* void. *State v. Addy* (Vroom), 547.

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See ATTORNEY AND CLIENT, 843; EVIDENCE, 170; EXECUTOR AND ADMINISTRATOR, 406; WATER AND WATERCOURSE, 785.

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1. **Injunction bond — counsel fees.]** In an action on an injunction bond, counsel fees are recoverable, as part of the damages, for services in all the courts, but only for services in procuring the dissolution of the injunction. *Bolling v. Tate* (Ala.), 5.
2. **Measure of — pledge by factor of principal's goods.]** Where a factor pledges the goods of his principal for his own debt to an innocent pledgee, the principal's recovery must be reduced by the amount due from him to the factor. *First National Bank of Louisville v. Boyce* (Ky.), 198.

Measure of.] *See* BURIAL, 409; LANDLORD AND TENANT, 797; VENDOR AND PURCHASER, 374.

Mitigation in trespass.] *See* TRESPASS, 337.

DEBTOR AND CREDITOR.

Discount of note — rescission on discovery of maker's insolvency.] A bank discounted a note and placed the proceeds to the credit of the borrower. Subsequently discovering that the maker was insolvent, it tendered back the note and refused to pay the proceeds to the borrower's assignees. *Held*, right. *Dougherty v. Central National Bank* (Penn. St.), 750.

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1. **Boundary — Side of road.]** A grant of "side" of a road extends to the center, in contrary intention. *Low v. Tibbets* (Me 1894), 61.
2. **False description.]** A mortgage described "being all of block 25," etc. It appears to be all of block 25, but they were in another block. The intention was to mortgage the block in block 25. *Held*, effectual to convey (Ill.), 61.

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Certificate that mortgage is valid.] A mortgagee, by taking an oath, that his mortgage is valid, and

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posed assignees, and that he has no defense thereto, is estopped from setting up the usuriousness of the mortgage, as against those assignees, or their assignees, purchasing the mortgage in reliance on the certificate. *Weyh v. Boylan* (N. Y.), 669.

By judgment.] See NEGOTIABLE INSTRUMENT, 489.

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See LANDLORD AND TENANT, 797.

EVIDENCE.

1. **Almanac.]** An almanac is admissible in evidence to prove the hour of moon-rise on a past night. *Munshower v. State* (Md.), 414.
2. **Declarations of agent.]** In an action against a railroad company by one of its employees for personal injury sustained by reason of the incompetence of a section foreman, evidence of the statement of the defendants' roadmaster, several days afterward, that the foreman was incompetent, is incompetent to show knowledge on the part of the company. *McDermott v. Hannibal & St. Joseph Railroad Company* (Mo.), 526.
3. **"Immediately."]** Where a contract is to be performed "immediately," evidence is inadmissible to excuse delay in the performance. *Id.*
4. **Leading questions — new trial.]** On a criminal trial and conviction, where the only evidence against the defendant was the testimony of two girls, nine and eleven years old respectively, and leading questions were allowed to be put to them under objection, *held*, that a new trial should be granted. *Coon v. People* (Ill.), 28.
5. **Memorandum — printed report.]** A newspaper reporter, called as a witness, may refresh his recollection as to an occurrence in his presence, by referring to the report of it printed from his statement made at the time. *Commonwealth v. Ford* (Mass.), 426.
6. **Parol — instrument signed by two executors.]** Where two executors sign a release of a mortgage, parol evidence is competent to show that only one had the money. *McKim v. Aulbach* (Mass.), 470.
7. **— of custom to, contradict contract.]** Where a contract called for Early Rose potatoes, evidence that mixed potatoes, consisting mainly of Early Rose, were generally known as Early Rose potatoes, is inadmissible. *Id.*
8. **Telegrams — statute.]** A telegraph operator, having possession of a telegraphic dispatch, may be compelled by a party to it, who is seeking to prove a contract by it, to produce it in court, although a statute forbids the operator divulging its contents to anybody but the person to whom it is addressed. *Woods v. Miller* (Iowa), 170.
9. **—** A copy of a telegram, received at the office of its destination, is not the best evidence, and is only receivable on proof of loss of the original left at the transmitting office, and that it is a correct copy of such original. *Smith v. Easton* (Md.), 355.

EVIDENCE — *Continued.*

10. Testimony of deceased witness.] Where a witness, called on to testify to the previous testimony of a deceased witness, cannot recollect the very words, he may state in his own language the facts detailed, as impressed on his mind at the time. *Hepler v. Mt. Carmel Savings Bank* (Penn.), 818.

Of agreement to vary liability of indorser.] See NEGOTIABLE INSTRUMENT, 101, 113, 353, 530.

Of notice of defect in street.] See MUNICIPAL CORPORATION, 98.

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See CARRIER, 787; CRIMINAL LAW, 38; VENDOR AND PURCHASER, 374.

EXECUTOR AND ADMINISTRATOR.

1. Agreement to arbitrate — statute of frauds.] An administrator having brought a suit in his representative capacity, the parties orally agreed to submit the subject-matter to arbitration, and that if the award proved satisfactory each should pay half the costs, but if unsatisfactory, the party refusing to accept should pay all the costs. The arbitration was executed, the administrator refused to accept the award, prosecuted the action to judgment, and the defendant paid the costs and sued the administrator individually for repayment. *Held* maintainable. *Holderbaugh v. Turpin* (Ind.), 124.

2. Funeral expenses.] Horse feed and dinners furnished to persons attending a funeral, without the request of the executor or administrator, are not proper funeral expenses to be paid out of the estate, and cannot be made so by neighborhood usage. *Shaeffer v. Shaeffer* (Md.), 406.

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EXEMPTION.

From taxation.] See BURIAL PLACE, 732.

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See BANKRUPTCY, 719.

FERRY.

Exclusive — owner of goods transporting them.] One may lawfully transport his own goods habitually in his own boat where another has an exclusive right of ferry. *Alexandria, Warsaw & Keokuk Ferry Company v. Wisch* (Mo.), 585.

See CONTRACT, 519.

FIXTURES.

Mirrors in wall.] Mirrors set in walls of a dwelling-house, the frames corresponding with the cabinet-work of the rooms, and some of the frames being arranged for hat racks and umbrella stands, and the removal of which would leave the walls unfinished, are fixtures upon which a mechanic's lien will attach. *Ward v. Kilpatrick* (N. Y.), 674.

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See NEGOTIABLE INSTRUMENT, 652.

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Conveyance — preference of creditor.] A creditor may lawfully take from his debtor a conveyance with the honest purpose of securing his own debt, although he knows that it is intended to hinder and delay other creditors. *Shelley v. Boothe* (Mo.), 481.

In election.] *See* CRIMINAL LAW, 808.

Principal's liability for agent's.] *See* AGENCY, 581.

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On fair-ground.] *See* INJUNCTION, 30.

GIFT.

1. **Causa mortis — delivery.]** S., being ill, gave C. a written order on a savings bank for the payment to C. of a deposit standing in the bank in the name of S. A memorandum was subjoined, that "the book must be sent with this order." The book being in the possession of G., S. at the same time gave C. a written order for it. C. presented the order for the money to the bank, without the book, and the bank refused to pay it without the production of the book. S. died three months later, at a different place, but whether of the same disease did not appear. In an action by C. against the administrator of S. for the deposit, it not appearing that C. ever had the book or ever tried to get it, *held*, there could be no recovery. *Conser v. Snowden* (Md.), 368.

2. **Savings bank deposit.]** A. deposited money in a savings bank in the name of B. without any declaration of trust contemporaneously or subsequently, and not in view of death, and retained the deposit book until his death. *Held* not a gift of trust. *Robinson v. Ring* (Me.), 808.

GUARDIAN AND WARD.

See SURETY, 248.

GUARANTY.

Notice of acceptance.] A guarantor is entitled to notice that his guaranty is accepted, unless such notice is implied from the transaction. *Thompson v. Glover* (Ky.), 220.

See NEGOTIABLE INSTRUMENT, 552.

HIGHWAY.

Obstruction — nuisance.] A stage-coach stopping for an unreasonable time on a public highway, in front of and obstructing the entrance of a camp-meeting ground, is a nuisance, and may be removed by those who are inconvenienced, or by a deputy sheriff. *Turner v. Holtzman* (Md.), 361.

HOMESTEAD.

1. **Voluntary conveyance of, as against creditors.]** A voluntary conveyance by a debtor of land in which he has a right of homestead is not constructively fraudulent as to his creditors, but on his death, leaving neither wife nor child, they may subject it to their claims. *Fellows v. Lewis* (Ala.), 1.
2. **Wife separated from husband.]** A wife, permanently separated from her husband by agreement, after his neglect to support her, may acquire a homestead. *Kenley v. Hudson* (Ill.), 31.

HOMICIDE.

See CRIMINAL LAW, 187, 213.

IGNORANCE OF LAW.

See CRIMINAL LAW, 515.

INDORSER.

See NEGOTIABLE INSTRUMENT, 101, 113.

INFANCY.

See MASTER AND SERVANT, 457.

INJUNCTION.

1. **To restrain gambling on fair-ground.]** In absence of proof of pecuniary injury to the complainant or the association, an injunction will not issue at the suit of a stockholder in an incorporated fair association, to restrain the company and its officers from permitting gambling on the grounds for a pecuniary reward. *Cope v. District Fire Association of Flora* (Ill.), 30.

See MUNICIPAL CORPORATION, 272 ; NUISANCE, 704.

INSANITY.

Deed — revocation — restitution.] An insane grantor, whose insanity was known to the grantee at the time of the grant, and who has not ratified his conveyance after restoration to reason, may avoid the conveyance without restitution. *Crawford v. Scovell* (Penn. St.), 766.

See NEGOTIABLE INSTRUMENT, 821.

INSURANCE.

1. **Accidental self-destruction.]** A policy of life insurance, conditioned to be void if the insured should "die by his own hand or act, voluntary or otherwise," is not avoided by his innocently taking a fatal overdose of medicine, while sane. *Penfold v. Universal Life Insurance Company* (N. Y.), 660.
2. **Agent — power to bind company.]** An insurance agent, with power to solicit, receive and report applications, has no power to accept them, or to bind his company by stating that the risk attached at a certain moment. *Stockton v. Firemen's Insurance Company* (La. Ann.), 277.
3. **— to change or waive.]** Conditions in respect to notice and proofs of loss may be waived by an agent by parol, in spite of a provision that no agent can change the terms or conditions and the same shall not be changed or waived except in writing signed by the president or secretary. *Carson v. Jersey City Fire Insurance Co.* (Vroom), 584.
4. **— general, power to waive condition.]** Where a policy of insurance provides for forfeiture in case of non-payment of premiums at the stipulated time, and that no alteration or waiver of any condition shall be valid "unless made at the head office and signed by an officer of the company," an oral extension of the time of payment, by a general agent, at another place, is invalid. *Marvin v. Universal Life Insurance Company* (N. Y.), 657.
5. **Cancellation — mutual company.]** An insurance by a mutual company may be cancelled by agreement of the parties, and the insured is not liable to assessment on his premium notes for subsequently-contracted indebtedness. *Akers v. Hite* (Penn. St.), 792.
6. **Delivery of policy.]** Delivery of a policy to an agent authorized to deliver it to the insured and receive the premium, and his delivery of the policy to the insured and acceptance of a note for the premium and procuring a discount of the same for his own account, without paying the premium to the principal, constitutes a valid insurance, in spite of a provision in the policy that such agent shall be deemed the agent of the insured, and that the insurer shall not be liable until he actually receives the premium. *Carson v. Jersey City Fire Insurance Co.* (Vroom), 584.
7. **Fraud.]** Under a condition that "all fraud by false swearing or otherwise shall cause a forfeiture," etc., mere mistake or innocent over-valuation does not constitute a defense. *Carson v. Jersey City Fire Insurance Co.* (Vroom), 584.
8. **"Grain" — flax.]** A stack of flax, raised solely for seed, is "grain in stack," within the meaning of an insurance policy. *Hewitt v. Watertown Fire Insurance Company* (Iowa), 174.
9. **Habits of sobriety.]** An applicant for insurance on his own life answered in the application that his habits then were and always had been sober and temperate, and agreed that the policy should be held void if any untrue answer should have been made. *Held*, that this answer being in fact

INSURANCE -

untrue, the policy was void, although and with no intent to deceive. *Har Company* (La. Ann.), 294.

10. Husband for wife — statutory co any married woman to insure her h claims of his creditors, to an amou not exceeding \$300 paid by him, de solvent husband's life to any amou ceeding that sum are paid by him w the proceeds will be apportioned acc creditors. *Pullis v. Robison* (Mo.),

11. Misrepresentation — adjustment.] adjusted and promised to pay a lo misrepresented his title to the pr the policy, according to its terms, v might have its promise and the p *Barnett* (Mo.), 517.

12. Notice of loss — mailing.] Where notice of losses shall forthwith be g the mailing of such notice, properl of service. *Susquehanna Mutual nock Toy Company, Limited* (Penn.

13. Ownership.] On an application fo ship of the premises is not broker *Carson v. Jersey City Fire Insuran*

14. "Vacant or unoccupied."] A fire cupied to the knowledge of the with its outbuildings and farm farm, together with the furniture with a condition that the policy sh premises become vacant or unocc thirty days," without consent. At was living in the dwelling-house, l furniture, in charge of his farmer, farmer's family aired the dwelling- wife visited it once a fortnight. T some of its outbuildings were burn *Held*, that the insurance was forfe *ance Company* (N. Y.), 644.

15. Warranty — unanswered question brances constitutes no warranty. (Vroom), 584.

INTEI

See MUNICIPAL C



JEOPARDY.

See CRIMINAL LAW, 423.

JUDGMENT.

Former — bar.] A former judgment, in an action of damages for wrongful discharge from employment before expiration of the term of service, is not a bar to a subsequent action for wages earned and due before the discharge. *Perry v. Dickerson* (N. Y.), 663.

Estoppel by.] *See* NEGOTIABLE INSTRUMENT, 489.

JURY.

Discharge of.] *See* CRIMINAL LAW, 423.

JUSTICE OF PEACE.

Power to punish for contempt.] *See* CONTEMPT, 502.

LANDLORD AND TENANT.

1. **Eviction — measure of damages.]** The owner of ore lands, in consideration of a royalty, demised and let them for fifteen years, the lessee covenanting to erect machinery to take out the ore, and the lessor covenanting that at the end of the term the lessee might remove all buildings and machinery which he had erected. There was no express covenant of title or for quiet enjoyment. The lessee was evicted by a paramount title three years later. In his action to recover damages of the lessor, *held*, that only nominal damages could be recovered. *Lanigan v. Kille* (Penn. St.), 797.
2. **Lease — holding over.]** A tenant under a lease for five years, rent payable monthly, held over three days, and on the third day notified the landlord in writing that he would surrender at the expiration of that month, and paid the month's rent, leaving the keys on a table in the landlord's office, the landlord accepting the rent but refusing to receive the keys. *Held*, that the landlord might treat him as tenant for the rest of that year, on the former terms. *Tolle v. Orth* (Ind.), 147.
3. **Partnership — working land on shares.]** An agreement by one to farm the land of another for a year, for one-half the products, each furnishing half the seed, stock, etc., the farmer to furnish the implements and working animals and all the labor, and pay the road tax and half the other taxes, and to submit statements and settle quarterly, is a lease and not a partnership. *Brown v. Jaquette* (Penn. St.), 770.
4. **Restriction of use of premises.]** A lease described the premises, consisting of five acres, by metes and bounds, and concluded as follows: "Containing a certain steam saw-mill, dwelling-house," etc., with the privilege of using all the timber on the premises, but restricting the use

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LANDLORD AND TENANT

of the valuable timber to mill upon the premises. *Held* not to restrict the use of the premises. *Reed v. Lewis* (Ind.), 88.

Ante-nuptial lease.] See Marriage, 756.

LARCENY

By bailee.] See CRIMINAL LAW, 762.

See CRIMINAL LAW, 762.

LEASE

See LANDLORD AND TENANT

LIMITATION, STATUTE OF

1. **Action against recorder for false certificate.]** A recorder of deeds, for damages by which a claimant is injured, when the claimant parted with the land, and the recorder has issued a certificate of title, and the claimant has been injured by the same. *Owen v. Western Savings Bank* (Penn.), 88.
2. **Demand.]** The cause of action on a contract, or a negotiable instrument, and demand on one of the contractors. *Rhine v. Rhine* (N. C.), 88.
3. **Disability arising subsequently to the statute of limitations has once attached, does not postpone its operation.** *Kistler v. Heister* (N. C.), 88.
4. **Expectation of compensation for service for another, for no agreed term.]** A mere expectation of being remunerated for service for another, for no agreed term, will makes no such provision, that from the testator's death, as in the case above effect, but from the end of the service performed. *Miller v. Lash* (N. C.), 88.
5. **Payment by joint debtor.]** Part payment by a joint debtor, without the assent or knowledge of the other, will not run against the demand, will not run against the demand, will not run against the demand. *Dickinson* (Ill.), 47.
6. **—.]** Payment of interest and principal on a promissory note, before the statute of limitations, will prevent the running of the statute as to the principal. *(Md.)*, 417.

See BANK, 474 ; CONSTITUTION, 474.

LIS PENDENS

See NOTICE

LOTTERY.

See CRIMINAL LAW, 582.

LOST PROPERTY.

See CRIMINAL LAW, 515.

MALICIOUS PROSECUTION.

Termination of criminal proceeding.] The entry of *nolle prosequi* is not necessarily such a termination of a criminal proceeding as meets the requirements of a cause of action for malicious prosecution; but otherwise of the discharge of a prisoner upon failure to find an indictment. *Grass v. Dawson* (Mass.), 429.

See CORPORATION, 468.

MANDAMUS.

Not the remedy in case of doubtful right. *People ex rel. v. Johnson* (Ill.), 63.

MARRIAGE.

- 1. Divorce—alimony—remarriage.]** The remarriage of a divorced wife to whom alimony has been granted is a valid ground for revoking or reducing alimony, it not appearing that the new husband is not able to support her. *Stillman v. Stillman* (Ill.), 21.
- 2. Divorced woman's action against former husband.]** A divorced woman can recover for services rendered by her to her former husband before the marriage. *Carlton v. Carlton* (Me.), 307.
- 3. Husband's liability on wife's ante-nuptial lease.]** A widow hired a house, and afterward during the term re-married, continuing in the house, and receiving visits there from her husband, who however lived elsewhere. *Held*, that the husband was not liable for use and occupation. *Biery v. Ziegler* (Penn. St.), 756.
- 4. Married woman's invalid deed—claim for purchase-money—betterments.]** A married woman's deed, unless executed in conformity to the statute, is absolutely void; the vendee has no lien on the land for the purchase-money paid and by her consumed, nor any right of action therefor against the woman personally; nor can he recover for his betterments, nor can innocent purchasers under his mortgage be allowed therefor except as against her claim of damages for use and detention. *Scott v. Battle* (N. C.), 694.
- 5. — Liability for necessities purchased on her credit.]** A married woman is liable for necessities purchased by her upon credit, and upon her oral promise to pay for them, although they are intended for and are used by her husband and children as well as herself, and although at the time of the purchase she had no separate estate. *Tismeyer v. Turquist* (N. Y.), 674.

See BURIAL, 465; NEGOTIABLE INSTRUMENT, 265.

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MASTER AND SERVANT

1. **Negligence** — action by servant against master to maintain an action for an injury negligently caused by servant. *Osborne v. Morgan* (Mass.), 437.
2. ——— infant — co-servant.] A boy found at machinery two years and a half in the hands of a servant's carelessly starting the machinery. No incompetency being shown in the selection of him, *held*, that the action was maintainable against the master. *Curran v. M. C. Curran* (Mass.), 457.
3. ——— of co-servant.] A fireman on a collision between his train and another train. The custom and rule of the company was to move it in conformity to telegraphic signals to be delivered by the receiving operator in the presence of one another. In this instance the operator gave the message to the conductor, who receipted for it in the engine book, to the knowledge; and the operator advised the engineer, and the engineer proceeded. It did not appear but that the conductor was skillful, and it appeared that the rule was followed. *Held*, that the negligence was that of the fireman, and there could be no recovery therefor. *Jewett* (N. Y.), 627.

MEASURE OF DAMAGES

See DAMAGES

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See EVIDENCE, 427 ; NEGOTIABLE INSTRUMENTS

MORTGAGE

1. **Assumption by grantee** — grantee's estate under a warranty deed, having taken the premises as part of the consideration, the holder of the mortgage cannot recover. *Leavitt* (N. Y.), 617.
2. **Of chattels** — fraud.] A mortgage of chattels exclusively fraudulent as to creditors but

MORTGAGE — *Continued.*

the power to sell in the ordinary course of trade, and does not require him to account to the mortgagee for the proceeds of such sales. *Clark v. Hyman* (Iowa), 160.

3. **Statement of debt.]** An indebtedness upon several promissory notes may be stated in a chattel mortgage as a gross sum of money, equal to the principal and interest of the notes, without mentioning the notes. *Id.*
4. **To secure future advances — preference over subsequent judgment.]** A mortgage to secure future indorsements, duly recorded, has preference over a judgment subsequently entered against the mortgagor, whether such indorsements were made before or after the entry of the judgment. *Ackerman v. Hunsicker* (N. Y.), 621.

See ESTOPPEL, 669.

MUNICIPAL CORPORATION.

1. **Contract with officer of — when void.]** The employment by a board of health of a city, of one of its members, to vaccinate pupils in a public school, is void as against the city, where the members of the board are by statute only authorized to receive an annual salary to be fixed by the common council. *City of Fort Wayne v. Rosenthal* (Ind.), 127.
2. **Injunction against passing ordinance.]** A city may not be enjoined from passing an ordinance. *Harrison v. City of New Orleans* (La. Ann.), 272.
3. **Interest, power to bind itself for.]** A municipal corporation, authorized to contract for services and purchase of property, and unrestricted as to amount or mode of payment, may bind itself to pay by interest-bearing orders on its treasurer. *County of Jackson v. Rendleman* (Ill.), 44.
4. **Liability on order for money.]** A county issued an order on its treasurer for the money. The payee indorsed it in blank and lost it. The relator in good faith purchased it. The county issued a duplicate order to payee, and the treasurer paid it. *Held*, that the relator could not recover in any form of action against the county. *People ex rel. v. Johnson* (Ill.), 63.
5. **Negligence — injury during repairs of highway — respondeat superior.]** County commissioners are not liable for an injury sustained by a traveller on one of the county highways by the negligence of a laborer engaged in the repairing of the road upon the employment of the road supervisor, an independent officer appointed in pursuance of law. *County Commissioners of Anne Arundel County v. Duvall* (Md.), 393.
6. **— unsafe pound — injury to cattle in — remote cause.]** A city is liable in damages for an injury to an animal impounded by it, when caused by the improper tying of the animal, and by the insufficient height of the fence. But where the fence is of the ordinary height, and the animal hurts itself by wild and vicious attempts to overleap it, the city is not liable by reason of the improper tying, nor by reason of a failure to post notices and sell the animal within the statutory time. *City of Greencastle v. Martin* (Ind.), 93.

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7. **Street, defect in — notice.]** Notice to street of the city is notice to the city at the time engaged in any official (Ind.), 79.
8. **—— evidence — notice.]** In an action occasioned by a defect in a street, evidence of similar accidents at the same point, and the council are competent to show the report and their action thereon in respect *Delphi v. Lowery* (Ind.), 98.
9. **—— firing cannon in — nuisance —** intoxicated but not otherwise disordered hours in the streets of a borough, no action, and in so doing negligently injured. A police officer stood by, but made no arrest. A borough was authorized to appoint police. That the borough was not liable in damages. *Norristown v. Fitzpatrick* (Penn. St.), 135.
10. **Water — surface.]** A municipal corporation has the right to regulate the flow or regulation of its streets, to collect and discharge it in a body on the land, and the occasioned not only by the concentration of water through a culvert of insufficient size. The question is on a lower level than the *Weis v. City of Madison* (Ind.), 135.

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Wife's liability for.] See MARRIAGE, 67

NEGLIGENCE

1. **Contributory — riding on front platform.]** negligent, for a passenger on a crowded platform, with the assent of the conductor. *Ry. Co. v. Walling* (Penn. St.), 796.
2. **——.]** Is matter of defense, and the city is not bound affirmatively to show negligence. *Buesching v. St. Louis Gas-light Co.*
3. **Dangerous premises — tenant.]** A landlord is liable for dangerous premises with a dangerous opening. The tenant must guard the same so as to secure persons from injury. *Id.*
4. **Owner's liability for contractor's.]** A city is liable to build a drain from the cellar of its building, and is necessary to cut through a plank.

beneath the surface of the street to prevent the tide from flowing into cellars in that locality. The contractor so negligently performed this part of his work that the tide water flowed through the opening made by him into the cellar of a building owned by plaintiff, adjoining that of defendant. *Held*, that defendant was liable for the injury done by the tide water to plaintiff's premises. *Sturges v. Theological Education Society* (Mass.), 483.

8. **Wharf-owner — contributory negligence.**] A customs officer, searching for smugglers at a wharf where foreign vessels discharged, having no lantern, fell into the water through an opening left unguarded and unlighted in the wharf by the owner, and was injured. *Held*, that he could maintain an action therefor. *Low v. Grand Trunk Railway Company* (Me.), 331.

See ANIMALS, 76; CARRIER, 787, CRIMINAL LAW, 187, 787; BAILMENT, 397; MASTER AND SERVANT, 627, MUNICIPAL CORPORATION, 98, OFFICER, 649.

NEGOTIABLE INSTRUMENT.

1. **Agent — execution by.]** A promissory note running "we, the trustees of the First Free Will Baptist Society of Chicago"—that being the correct corporate name—was signed by several with the addition, "Trustees of the First Free Will Baptist Society of Chicago, Illinois." *Held*, the note of the corporation, and not of the individual makers. *New Market Savings Bank v. Gillet* (Ill.), 39.
2. **—.]** A note, by which "the subscribers for Carmel Cheese Manufacturing Company promise to pay," and signed by the directors of the company without official description, is the obligation of the company. *Simpson v. Garland* (Me.), 297.
3. **Alteration — filling in date.]** Where a note is indorsed, the date having been left blank, the presumption is that the indorsee is authorized to supply it. *Hepler v. Mt. Carmel Savings Bank* (Penn. St.), 813.
4. **Duress of maker — indorser's liability.]** The duress of the maker of a promissory note will not avail a voluntary indorser for a sufficient consideration. *Bowman v. Hiller* (Mass.), 442.
5. **Fraud — indorser not disclosing maker's infancy.]** A minor made his note, and his father indorsed it and got it discounted without disclosing the maker's infancy or making any representation as to his age. *Held* not fraudulent. *People's Bank Appeal* (Penn. St.), 728.
6. **Indorser — lunacy of.]** No action will lie on an accommodation indorsement of a promissory note by a lunatic, even in favor of an innocent holder. *Wirebach v. First National Bank* (Penn. St.), 821.
7. **— presumption as to — transfer by maker.]** One who has acquired an indorsed note from the maker cannot recover against the indorser without alleging that the instrument was for accommodation. *Callahan v. First National Bank of Louisville* (Ky.), 262.

NEGOTIABLE INSTRUMENTS

8. — liability of, on married woman's a mortgage on her separate lands, act defendant, and accompanying the mortgage her own order and by her indorsed in husband. The mortgage and notes The defendant also indorsed the note an innocent holder by the maker's liability maturity no steps were taken to fix the Under Louisiana law the notes not be indorser, or her innocent transferee the indorser was liable thereon with (La. Ann.), 265.
9. — forgery — guaranty.] A stranger draft drawn by a New Jersey bank had been fraudulently altered by raising and the name of the payee. The stranger, and put his name on the draft, to the plaintiff's knowledge. The draft from the stranger. The draft money was refunded on discovery of indorsement, held, that he could not forgery ; and that he was not liable of non-payment. *Susquehanna Valley*
10. — before utterance — guaranty.] note after delivery, but before the payee and indorser, and does not authorize of guaranty. *Hayden v. Welden* (Vt.)
11. — evidence to vary liability of.] before the payee may avoid his apparent proof of a different understanding of *Owings v. Baker* (Md.), 353.
12. —.] Although the presumptive liability the back of negotiable paper before not liable to the payee, yet parol evidence contemporaneous and mutual intent of maker or surety. *Kealing v. Vansick*
13. — regular, evidence to vary liability to vary the apparent liability of one promissory note after the payee, by made simply for the purpose of indemnity (Ind.), 118.
14. —.] In a suit by indorsee against acceptor not be permitted to show an agreement the liability should be joint and several (Vroom), 580.

NEGOTIABLE INSTRUMENT — *Continued*

15. **Memorandum on note.]** On the back of a note was printed: "The indorsers waive presentment, protest and notice of dishonor." The payee indorsed his name in another place entirely disconnected from the memorandum, and the note was transferred. *Held*, that the memorandum was part of his contract. *Farmers' Bank of Kentucky v. Ewing* (Ky.), 231.
16. **Payment — placing funds at place of.]** Depositing at the place of payment designated in a note, at maturity, sufficient funds to pay it, operates as payment, although the depository fails, and consequently the funds are lost. *Lazier v. Horan* (Iowa), 167.
17. **Promise to accept for given sum — overdraft.]** If one promises by telegraph to accept a draft for a specified sum, and the draft being afterward drawn for a larger sum, he refuses to accept, he is not liable on the draft to any extent, nor for breach of agreement to accept. *Brinkman v. Hunter* (Mo.), 492.
18. **Protest — residence of indorser.]** Where an indorser of a note at the time of indorsing lived in Baltimore, and continued there sometime afterward, but at the time of dishonor of the note had removed from the city, but retained his sign at his old place of business and his name in the city directory, *held*, that the notary being ignorant of his removal, he was properly treated, in the protest of the note, as still a resident of that city. *Reier v. Strauss* (Md.), 390.
19. **Ratification — promise to pay forged note.]** One whose name is signed to a note by another as surety, without his knowledge or authority, is not rendered liable by his promise to the payee after transfer to pay it. *Owsley v. Philips* (Ky.), 258.
20. **Signing note after delivery — judgment — estoppel.]** A note signed by a principal and a surety, both apparently principals, was signed by the defendant two months after its execution and delivery for value, at the request of the payee, for his accommodation. The payee afterward recovered against the three by default and consent. One of the original makers having paid the judgment, sued the defendant for contribution. *Held*, (1) that the defendant's signing imposed no liability; (2) that he was not precluded from setting up that defense by the judgment. *McMahan v. Geiger* (Mo.), 489.
21. **Transfer after maturity — equities.]** A., owning a negotiable county bond, deposited it with a bank for safe-keeping. S., owning another bond of the same series and like amount, pledged it as collateral security for his note, and the pledgee deposited the bond and note with B. for safe-keeping. S., having obtained possession of A.'s bond without the knowledge of A. or A.'s depository, took it to B. and exchanged it for his own bond on deposit with him. This was more than five years after the maturity of the bonds. *Held*, that A.'s ownership was superior to the lien of S.'s pledgee. *Greenwell v. Haydon* (Ky.), 234.

See PARTNERSHIP, 290.

NEW TRIAL.

See EVIDENCE.

NOTARY PUBLIC.

Liability for false certificate.] A notary public is not liable in damages for a false certificate of acknowledgment unless the plaintiff affirmatively and clearly shows an intentional dereliction of duty. *Commonwealth v. Haines* (Penn. St.), 805.

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Bank — liability for fraud of officers, 760.

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Will — devise — life estate or fee, 318.

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NOTICE.

Lis pendens — conveyance pending contest of will.] A conveyance by heir or devisee, of lands devised, pending proceedings to contest the validity of the will, is subject to a subsequent judgment in such proceedings, although no notice of the pendency of such proceedings has been filed as required by the statute in actions based on an equitable right, claim or lien, designed to affect real estate. *McIlwraith v. Hollander* (Mo.), 484.

Of acceptance.] See GUARANTY, 220.

To corporation.] See CORPORATION, 319.

Of defective street.] See MUNICIPAL CORPORATION, 79, 98.

Of loss.] See INSURANCE, 816.

NUISANCE.

1. **Planing-mill and cotton-gin — injunction.**] The erection of a planing-mill and cotton-gin will not be enjoined, at the suit of one dwelling in the vicinity, on account of the anticipated noise and increase of peril by fire. *Dorsey v. Allen* (N. C.), 704.

2. **Private burial ground.**] A private burial ground near dwellings is not necessarily a nuisance, and its use can only be enjoined on clear proof of probable injury. *Kingsbury v. Flowers* (Ala.), 14.

Profane swearing.] See CRIMINAL LAW, 713.

See HIGHWAY, 361; MUNICIPAL CORPORATION, 771; WATER AND WATER-COURSE, 785.

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2. **Note of firm made by one partner.]** A partner sues a firm on a note executed to him by the partners for his individual debt, he cannot sue the other partners without affirmative authority or a ratification by the other partners. *Insurance Company v. Richardson*

3. **Partner secretly buying assets on dissolution.]** If the assets of a partnership were sold, on dissolution, at public auction, and the partner secretly conveyed them to one of the partners in an arrangement made before the sale and bid. *Held*, that the purchaser was bound therefor, as if no sale had taken place.

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SLANDER AND LIBEL.

1. **Privileged communication.]** A professor at the United States Naval Academy at Annapolis placed his written resignation in the hands of the superintendent of the academy, to be forwarded to the secretary of the navy. The superintendent being required by law to indorse his opinion thereon, indorsed his opinion stating why he thought the resignation should be accepted. *Held*, that this indorsement was presumptively but not absolutely a privileged communication. *Maurice v. Worden* (Md.), 384.
- 2.—.] A libellous letter written by a minister to an association of ministers of which he is not a member, concerning one of its members, is not privileged. *Shurtleff v. Parker* (Mass.), 454.
3. **Unauthorized repetition.]** One who utters a slander is not responsible for its unauthorized repetition. *Id.*

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1. **Extra-territorial force.]** An administrator appointed and suing in Kentucky cannot maintain an action for the death of his intestate by negligence in Indiana, such action being maintainable under the Indiana statute but not under that of Kentucky. *Taylor's Administrator v. Pennsylvania Company* (Ky.), 244.
2. —.] A statute of Maine, enacting that the holder of a railway ticket shall have the right to stop over and that the ticket shall be good for six years, has no extra-territorial force. *Carpenter v. Grand Trunk Railway Company* (Me.), 340.
3. **Presumption.]** The law of other States will be presumed to be the common law. *Id.*
4. **Construction — "occupation" — woman as master in chancery.]** Under a statute providing that no person shall be precluded or debarred from any occupation, profession or employment on account of sex, a woman may be a master in chancery. *Schuchardt v. People* (Ill.), 34.

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SURETY.

1. **Discharge — giving time to one of two joint makers of note.]** An extension of the time of payment, granted by the payee of a note to one of two joint makers, without the knowledge or consent of the other, who is in fact a surety but not known as such to the payee, does not release the non-consenting joint maker. *Mullendore v. Wertz* (Ind.), 155.
2. **Executory agreement to compromise with principal.]** An agreement by a creditor to accept a certain percentage within a specified time, in full of his claim, but containing no stipulation for delay or extension, and never complied with, does not discharge a surety for the debt. *Miller v. Hatch* (Me.), 346.
3. **For faithful conduct — former default of principal.]** One who at the request of the principal, and without the knowledge of the obligee, signs a bond for the principal's faithful conduct as an insurance agent, is not released by the principal's previous neglect in the same employment to make payments promptly, which were subsequently made good; nor by the obligee's continuing him in his employment after such default; and if the surety allows his name to remain without protest after learning of such default, he is liable in future. *Home Insurance Company v. Holway* (Iowa), 179.
4. **Guardian and ward — fraudulent settlement — acquiescence.]** Acquiescence by a ward, for four years after majority, in a settlement made by him with his guardian, precludes him from impeaching it for fraud as against the surety, although the guardian was insolvent. *Aaron v. Mendel* (Ky.), 111.
5. **Liability for amount secured by principal's assignment.]** A creditor having received a portion of his claim under his debtor's general assign-

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ment cannot afterward assert a claim for that portion against a surety for the debt. *Bank v. Alexander* (N. C.), 702.

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1. **Accession — possession — ownership.]** One who cuts and stacks hay on another's uninclosed land, without permission, cannot maintain an action for its destruction. *Murphy v. S. C. & Pac. R. Co.* (Iowa), 175.

2. **Wrongful attachment — damages — offer to return property.]** In an action of trespass for wrongfully attaching and seizing goods, damages cannot be mitigated by proof of an offer to return the property in the same condition on the next day. *Carpenter v. Dresser* (Me.), 337.

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USURY.

1. **By agent.]** A loan made through the lender's agent, the lender understanding that the agent is to charge the borrower for the agent's services in procuring the loan, in addition to lawful interest, and the agent receiving pay therefor accordingly, is usurious. *Payne v. Newcomb* (Ill.), 60.
2. **Surety — usurious consideration for extension of time of payment.]** The payment of usurious interest, for time already elapsed constitutes a valid consideration for the extension of the time of payment of an obligation to pay money, although under the law the debtor or his sureties may recoup the amount so paid; and such a payment discharges the innocent surety. *Lemmon v. Whitman* (Ind.), 150.

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VENDOR AND PURCHASER.

1. **Contract.]** On a contract to convey "about sixty-five acres," the vendee is not bound to accept thirty or thirty-six acres. *Baltimore Permanent Building and Land Society v. Smith* (Md.), 374.
2. **Evidence — "about."]** In an action by the vendee for breach of such a contract parol evidence is inadmissible to prove a sale of sixty-five acres, or the vendor's representations that there were at least sixty-five acres. *Id.*
3. **Measure of damages.]** In such an action, the vendor having acted in good faith and without fault, the measure of damages is the purchase-money paid, with interest, and the expenses of the plaintiff for travel, board, and counsel fees while attending to the execution and fulfillment of the contract. *Id.*

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- Horse-racing — premium.]** A check given to an agricultural society to enable the drawer to enter his horse in competition in "a trial of speed" at an exhibition, for a premium offered by the society, is void under the statute against wagers and horse-racing. *Comly v. Hillegass* (Penn. St.), 774.

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WATER AND WATER-COURSE.

- Nuisance — fouling stream — custom.]** A coal mining company fouled a natural stream of water by pumping water from its mines into it, to the damage of a riparian proprietor. *Held*, that the act could not be justified either by the importance of the industry or by general custom. *Pennsylvania Coal Co. v. Sanderson* (Penn. St.), 785.

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WILL.

1. **Cancellation of legacies — alteration.]** A testator after execution of his will drew his pen transversely across the words creating some of the legacies, and in another instance, by means of visible alterations, substituted a less sum than that originally provided; several codicils were added. After probate of the whole, and in the absence of proof that the alterations were made after the last codicil, *held*, that the former legacies were cancelled and the latter not. *Linnard's Appeal* (Penn. St.), 753.
2. **Construction — rule in Shelley's case.]** A testator devised lands to his grandson James, "to hold during his life-time," and if he should have heirs, "to them or any of them that he may think proper," and if he should die without issue, "for the land to be equally divided among all my grandchildren." At the testator's death James was unmarried, but he afterward married and had children. At the date of the will the testator had other grandchildren. *Held*, that James took only a life estate, and the remainder vested in his children in fee. *Patrick v. Morehead* (N. C.), 684.
3. **Devise — life-estate or fee.]** A testator bequeathed and devised property to his wife, "with the right to use, sell, or otherwise dispose of the same, and the income and increase thereof, according to her own will and pleasure, during her life-time. And so much of said estate, with the increase, income and proceeds thereof, as might remain unexpended and undisposed of by her at her decease," he gave to others. *Held*, that the wife took only a life-estate. *Stuart v. Walker* (Me.), 311.
4. **Extrinsic paper referred to — admission of, to probate, after will.]** A paper referred to in a will, and containing directions for the disposition of the estate, but not executed or witnessed as a will, should be admitted to probate as part of the will, if it was in existence at the date of the will and is clearly identified; and when omitted by mistake at the probate of the will, it may be afterward admitted, although the time for appealing from the decree of probate has elapsed. *Newton v. Seaman's Friend Society* (Mass.), 433.
5. **Trust — uncertainty — charity — "deserving."]** A bequest to executors in trust to "distribute to such persons, societies, or institutions as they may consider most deserving," is void for indefiniteness. *Nichols v. Allen* (Mass.), 445.
6. — A trust provision in a will for "the purchase and distribution of such religious books or reading as they shall deem best," is for a public charity, and not void for uncertainty. *Simpson v. Welcome* (Me.), 349.
7. — immoral — public library — atheistical books.] A testamentary provision in trust for founding and endowing a public library is not avoided by the direction to publish books written by the testator, averred to be atheistical, nor by a direction that the trustees shall not exclude any

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